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No.

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), "precludes application of a federal statute" that would "invalidate, impair, or supersede" a state law "enacted * * * for the purpose of regulating the business of insurance." The questions presented in this case are:

1. Whether a state workers' compensation law that transfers the risk of workplace injuries to employers, and requires that employers secure their ability to assume those risks either by purchasing insurance or by self-insuring, regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act.

2. Whether a State's exclusive, administrative remedial scheme for handling contested workers' compensation benefit determinations is impaired within the meaning of the McCarran-Ferguson Act by the availability of suits under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, contesting the denial of workers' compensation claims.

RULE 29.6 STATEMENT

Cassens Transport Company is wholly owned by Cassens Corporation. No publicly held company owns 10% or more of the stock of Cassens Transport Company or Cassens Corporation. Crawford & Company has no parent company and is publicly traded. No publicly held company owns 10% or more of the stock of Crawford & Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cassens Transport Company ("Cassens"), Crawford & Company ("Crawford"), and Dr. Saul Margules respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-31a) is reported at 546 F.3d 347. The decision of the district court (*id.* at 32a-73a) is reported at 409 F. Supp. 2d 793.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2008. A petition for rehearing was denied on January 5, 2009. App., *infra*, 74a. On March 26, 2009, Justice Stevens granted an extension of time within which to file a petition for writ of certiorari to May 6, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the Appendix: Section 2(b) of the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 34, as amended, 15 U.S.C. § 1012(b); and the civil remedy provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. §§ 1961 *et seq.* App., *infra*, 75a-83a.

STATEMENT

Section 2(b) of the McCarran-Ferguson Act ("the Act"), 15 U.S.C. § 1012(b), provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by

any State for the purpose of regulating the business of insurance." The Act thus reserves to the States the authority to regulate insurance. This case concerns the application of the Act to Michigan's workers' compensation statute.

Under Michigan law, workers' compensation benefits are a form of "insurance of a social character" (*Lauder* v. *Paul M. Wiener Foundry*, 72 N.W.2d 159, 172 (Mich. 1955)), in which the risk of workplace injury is transferred from employees to employers. Michigan law closely regulates, in parallel fashion, the obligations both of employers who self-insure their risk of workers' compensation liability and of those who purchase insurance coverage of that risk from third parties. But in the decision below, the Sixth Circuit held that the McCarran-Ferguson Act does not preclude invocation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, by plaintiffs who allege fraudulent denial of workers' compensation benefits on the part of a Michigan employer that self-insures its workers' compensation risk. The court offered three rationales for this holding: (1) that state workers' compensation statutes do not regulate insurance because, in the court's view, an insurance contract between employee and employer does not exist in the workers' compensation context; (2) that self-insurance does not qualify as "insurance" under the Act; and (3) that federal RICO suits would not interfere with Michigan's exclusive administrative system of workers' compensation.

Each of these determinations is wrong, and each is troubling in significant respects. The Sixth Circuit misunderstood the application of the McCarran-

Ferguson Act to workers' compensation regimes, like the one in Michigan, that rest on implied contractual arrangements transferring the risk of workplace injuries to employers. Its holding also departs from decisions of this Court making clear that self-insurance *is* "insurance." And it is manifest that the streamlined efficiency of administrative workers' compensation regimes will be substantially impaired if plaintiffs may challenge benefit determinations through the medium of federal RICO suits. Because the Sixth Circuit's decision will interfere with state insurance regulation, threatens radical disruption of state workers' compensation arrangements, and involves what is sure to be a recurring issue of enormous practical importance, further review is warranted.

A. Statutory Background

1. The McCarran-Ferguson Act "transformed the legal landscape by overturning the normal rules of pre-emption" and imposing in their place the principle that "state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 507 (1993). Thus, a federal law (such as RICO) is "reverse preempted" by the McCarran-Ferguson Act (*i.e.*, has no effect) if its "application to the * * * claims at issue" would (1) "invalidate, impair, or supersede" a (2) state law enacted "for the purpose of regulating the business of insurance." *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 307 (1999) (internal quotation marks omitted).

A state law is enacted "for the purpose of regulating the business of insurance" if it is "aimed at protecting or regulating this relationship [between in-

surer and insured], directly or indirectly." *Fabe*, 508 U.S. at 501 (bracketed material in original). The state law need not *itself* constitute the "business of insurance" or "directly regulate the 'business of insurance'" (*id.* at 502-04), so long as it "possess[es] the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at 505 (citation omitted). In turn, whether a practice constitutes the "business of insurance" depends on three factors, none by itself determinative: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982).

As for the other element of McCarran-Ferguson reverse preemption, "to impair a law is to hinder its operation or frustrate [a] goal of that law." *Humana*, 525 U.S. at 311 (internal quotation marks omitted). A federal law impairs state law in this sense if it "directly conflict[s] with state regulation," "frustrate[s] any declared state policy," or "interfere[s] with a State's administrative regime." *Ibid.* (internal quotation marks omitted).

2. The aim of the Michigan workers' compensation system is "compensation, not damage." *Lauder*, 72 N.W.2d at 172 (internal quotation marks omitted). To accomplish this end, the Michigan Worker's Disability Compensation Act ("WDCA") makes the right to recovery of workers' compensation benefits an employee's exclusive remedy (with certain narrow exceptions not implicated here) for a non-intentional workplace injury (MICH. COMP. LAWS § 418.131(1)),

while also making all such injuries compensable regardless of fault or other traditional common-law defenses. *Id.* § 418.141. The WDCA does this by incorporating into every contract of employment implied contractual terms allocating liability for workplace injuries to the employer in the first instance. See *Brown* v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322, 326 (Mich. Ct. App. 1984) (per curiam). In doing so, the WDCA transfers the risk of injury from the employee to the employer: an employee "who receives a personal injury arising out of and in the course of employment" by a covered employer "shall be paid compensation as provided in this act." MICH. COMP. LAWS § 418.301(1).

Michigan employers may secure their liability for payment of such workers' compensation benefits in one of two ways. First, the employer may "insur[e] against liability" by obtaining a workers' compensation insurance policy from an "insurer authorized to transact the business of worker's compensation insurance." MICH. COMP. LAWS § 418.611(1)(b). Every such policy must contain the provisions for coverage and benefits set forth in the WDCA. *Id.* § 418.621(4). In particular, the insurer must "pay to the persons that may become entitled thereto all workers' compensation for which the insured employer may become liable under the [WDCA's] provisions." *Id.* § 418.621(4)(a).

Alternatively, the employer may "receiv[e] authorization from the [D]irector [of the Bureau of Workers' Compensation]" to be a self-insurer. MICH. COMP. LAWS § 418.611(1)(a). Employers who establish a self-insured, or self-funded, plan pay employees directly, instead of purchasing insurance for their employees from a third party. See generally *Metro.*

Life Ins. Co. v. *Massachusetts*, 471 U.S. 724, 742 (1985) (describing self-insurance). A Michigan employer may self-insure its workers' compensation liability only after making a "reasonable showing * * * of the employer's solvency and financial ability to pay the compensation and benefits provided for in" the WDCA. MICH. COMP. LAWS § 418.611(1)(a); see MICH. ADMIN. CODE R. 408.43b(3). As a general matter, self-insured employers also must retain an approved claims-handling company to administer claims. MICH. ADMIN. CODE R. 408.43a(5). Self-insured employers, just like insurers underwriting workers' compensation policies, must make payments to "employees as [they] become entitled to receive the payment under the terms and conditions of" the WDCA. MICH. COMP. LAWS § 418.611(1)(a).

B. Proceedings Below

1. Petitioner Cassens is an approved workers' compensation self-insurer under the WDCA and contracted with petitioner Crawford for claims adjustment and administration services. App., *infra*, 3a. Respondents are current or former employees of Cassens whose claims for workers' compensation under the WDCA were denied. They brought suit against Cassens, Crawford, and petitioner Margules (a physician who evaluated claims for workers' compensation benefits), alleging that petitioners fraudulently denied them benefits in violation of RICO. *Id.* at 1a-3a.

The district court granted petitioners' motion to dismiss, holding the RICO claim reverse preempted under the McCarran-Ferguson Act. App., *infra*, 57a-

64a.[1] The district court reasoned that the "WDCA does, in fact, regulate the business of insurance" because it "transfers or spreads * * * risk" and is an "integral part of [the] policy relationships between [the] insurer and [the] insured." *Id.* at 59a-61a (internal quotation marks omitted). The court added that allowing respondents' RICO claim to go forward would impair the operation of the WDCA. *Id.* at 61a-64a.

The district court explained that the WDCA "transfers or spreads * * * risk" because, "[a]s the Michigan Supreme Court has opined, '[t]he primary purpose of the * * * [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers.'" App., *infra*, 59a (quoting *Simkins* v. *Gen. Motors Corp.*, 556 N.W.2d 839, 843 (Mich. 1996)). Rejecting respondents' argument that the provision of workers' compensation benefits does not "compris[e] insurance," the district court observed that the "WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them." *Id.* at 61a. As such, an employer

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[1] The district court also held that the complaint failed to state a RICO claim because it did not plead reliance on petitioners' alleged misrepresentations. App., *infra*, 56a-57a. The Sixth Circuit initially affirmed that ruling (*Brown* v. *Cassens Transp. Co.*, 492 F.3d 640, 646 n.5 (6th Cir. 2007)), but this Court vacated the judgment and remanded for reconsideration in light of *Bridge* v. *Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008), which held that a civil RICO plaintiff need not show detrimental reliance. On remand, the court of appeals held in the decision below that respondents' RICO claim was sufficiently pled to survive a motion to dismiss. App., *infra*, 2a. That issue is not now before the Court.

who "elect[s] to self-insure its obligation to provide workers' compensation benefits to its employees * * * in effect[] stands in the stead of an insurance company" guaranteeing payment of those obligations. *Id.* at 60a.

The district court also concluded that a RICO claim challenging the denial of workers' compensation benefits would interfere with the WDCA's remedial scheme "because the RICO Act, in affording treble damages and a private right of action, provides [respondents] greater recourse than that which the WDCA provides." App., *infra*, 62a. Although "applying the RICO Act here would neither invalidate nor supersede the WDCA" – because the wrongful denial of workers' compensation benefits as part of a fraudulent enterprise would violate both the WDCA and RICO – doing so would "render Plaintiffs eligible for damages beyond those which the WDCA permits" and so "turn on its head the policy balance that the Michigan legislature struck in the WDCA." *Id.* at 62a-64a.

2. The Sixth Circuit reversed, holding that respondents' RICO claim is not reverse preempted by the McCarran-Ferguson Act because, in the court's view, (1) the WCDA was not enacted for the purpose of regulating the business of insurance and (2) even if were, the claim here would not invalidate, impair, or supersede the WDCA. App., *infra*, 15a-27a. (The Sixth Circuit agreed with the district court that RICO does not specifically relate to the business of insurance. *Id.* at 16a n.5.)

On the first of these points, the Sixth Circuit concluded that the "insurance-like impression" of workers' compensation benefits (*i.e.*, "they provide compensation for injuries like many forms of insur-

ance") was "solely a matter of appearance." App., *infra*, 19a. The court thus rejected the notion that, in the workers' compensation context, the employer serves as the insurer, the employee as the beneficiary, and the workers' compensation payment as the insurance proceeds (what the court labeled the "benefits-as-insurance" theory). *Ibid.* The court reasoned that "[i]nsurance is defined as '[a] contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk,'" and thought that "[t]here is no contract in the worker's compensation scheme." *Ibid.* Instead, in the court's view "[t]he WDCA is a public regulation of the employment relationship that is a substitute for the tort system rather than any contractual relationship between employees and employers." *Id.* at 20a. As a consequence, the court concluded that the WDCA was not enacted for the purpose of regulating the business insurance. *Id.* at 19a-21a.

In reaching this conclusion, the Sixth Circuit also rejected what it termed the "insurance-provisions theory," which posits that the WDCA regulates the business of insurance because it contains provisions that govern insurance contracts purchased by employers to cover their workers' compensation risk. App., *infra*, 23a-24a. The court of appeals recognized that "[t]here are several provisions of the WDCA that directly relate to the terms of the insurance contract [between the employer and insurer] and thus to 'the business of insurance'" (*id.* at 23a), but it deemed those provisions irrelevant to the issue whether the WDCA was enacted for the purpose of regulating the business of insurance. The court declared it "crucial" to this holding that "Cassens self insures" (*id.* at 24a), reasoning that "self-insurance does not relate to the 'business of insurance' under the McCarran-

Ferguson Act because there is no relationship between an insurer and an insured." *Ibid.*

The Sixth Circuit went on to hold in the alternative that "RICO is also saved from reverse preemption by the WDCA * * * because RICO would not 'invalidate, impair, or supersede' the WDCA." App., *infra*, 24a. The court recognized that RICO and the WDCA offer very different remedies: RICO provides for treble damages, while the WDCA offers only limited administrative penalties for wrongful failure to pay benefits due. *Id.* at 26a. But despite this difference, the court offered two reasons for finding no impairment. First, pointing again to Cassens' status as a self-insurer, the court held that, "because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance." *Id.* at 26a. And relying on this Court's decision in *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), the Sixth Circuit found it dispositive that the WDCA does not *expressly* address "*fraudulent* denial of worker's compensation benefits." App., *infra*, 26a-27a. Although the court pointed to nothing in Michigan law authorizing the award of treble or punitive damages for the fraudulent denial of workers' compensation benefits, it believed that a RICO suit pursuing enhanced remedies for fraud "would not contravene any '*declared* state policy or interfere with [the State's] administrative regime.'" *Id.* at 27a (quoting *Humana*, 525 U.S. at 310) (emphasis and bracketed material added by the court of appeals).

REASONS FOR GRANTING THE PETITION

Workers' compensation programs like the one in Michigan establish efficient administrative processes that transfer the risk of workplace injuries from employees to employers. In such regimes, the entitle-

ment to workers' compensation payments is included as an implied term in every contract of employment. State law assures that the employer, which is effectively insuring against the risk of workplace injury, is able to meet this obligation by either obtaining a workers' compensation insurance policy from an insurance company or by seeking authorization to self-insure its workers' compensation risk; in the latter case, the employer must retain an approved claims-handling company to administer claims. When establishing such workers' compensation programs – which create liability without fault, but also limit the size of payments for injury – States have carefully balanced the interests of employees and employers.

The decision below, however, overturns state policy choices regarding the regulation of insurance in the workers' compensation context, grossly distorting state programs of workers' compensation. That holding introduces burdensome and expensive federal RICO litigation into what had been closed, low-cost, and efficient administrative programs to resolve employee claims. This destructive effect is greatly compounded by the availability of treble damages and attorneys' fees under RICO, which change the incentives and burdens that States have made essential aspects of their workers' compensation insurance programs. Such an outcome directly frustrates the historic authority of the States, codified in the McCarran-Ferguson Act, to regulate the business of insurance. Because the Sixth Circuit's decision approving such a result departs from this Court's decisions under the Act, introduces significant confusion into the law, and is one of enormous practical importance, review by this Court is warranted.

I. STATE WORKERS' COMPENSATION PROGRAMS THAT REQUIRE EMPLOYERS TO ASSUME THE RISK OF WORKPLACE INJURIES, EITHER BY PURCHASING INSURANCE OR BY SELF-INSURING, REGULATE THE BUSINESS OF INSURANCE

The Sixth Circuit's ruling that the WDCA does not involve the business of insurance is hardly a model of clarity, but it plainly rests on two central and essential elements. First, the court held that workers' compensation categorically is not insurance because, in the Sixth Circuit's view, workers' compensation does not involve a "contractual insurance relationship." App., *infra*, 20a. Second, the court regarded as irrelevant Michigan's regulation of the nature of the workers' compensation benefits that must be provided by employers – including requirements imposed identically on employers who self-insure their workers' compensation risks and on those who purchase insurance of those risks – because Cassens self-insures and the court believed that self-insurance does not involve the business of insurance under the McCarran-Ferguson Act. *Id.* at 22a-24a. But both aspects of this analysis are wrong. They depart from this Court's precedent, will lead to inconsistent treatment of identically situated businesses, and will frustrate state policy regarding both insurance and workers' compensation.

A. Workers' Compensation Programs Like Michigan's, Which Transfer The Risk Of Injury, Regulate The Business Of Insurance

The Sixth Circuit recognized that "worker's compensation benefits may seem to act as a form of insurance because they provide compensation for inju-

ries like many forms of insurance." App., *infra*, 19a. The court of appeals surely was correct about that: workers' compensation under the WDCA transfers the risk of workplace injury from the employee to the employer, without regard to fault or other possible defenses on the employer's part. The Sixth Circuit nevertheless held that this risk transfer does not involve insurance because insurance requires a contract between the insurer and the insured and, the court believed, "[t]here is no contract in the worker's compensation scheme." *Ibid.* Instead, according to the Sixth Circuit, the WDCA created "a legislative remedy regarding the tort-liability relationship between employees and their employers, not an insurance contract." *Id.* at 20a.

But this categorical determination that workers' compensation has no contractual, risk-spreading component, which takes no account of the actual content of the applicable state law, misunderstands the inquiry that governs under the McCarran-Ferguson Act. It was the district court that was correct, both in its view that "[t]he WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them" (*id.* at 61a), and in its understanding of the relevance of that compelled contractual insurance relationship to application of the McCarran-Ferguson Act. The Sixth Circuit's contrary view, which was premised on a generic and seat-of-the-pants concept of workers' compensation, did more than distort Michigan law (although it surely did that); it announced a federal rule that inevitably will disrupt the mechanism by which States regulate insurance against the risk of workplace injuries. That holding turns on its head the McCarran-

Ferguson Act's assignment of regulatory authority in this area to the States.

1. As Michigan law illustrates, the Sixth Circuit was incorrect in its belief that "[t]here is no contract in [a] worker's compensation scheme." App., *infra*, 19a. As this Court has itself recognized, Michigan courts have held that workers' compensation benefits under the WDCA are "more analogous to contractual damages than tort damages." *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 188 (1992) (citing *Wilson* v. *Doehler-Jarvis Div. of Nat'l Lead Co.*, 100 N.W.2d 226, 229-230 (Mich. 1960), and *Brown*, 360 N.W.2d at 326). As a matter of Michigan law, an employee's right to an award of workers' compensation benefits under the WDCA "arises out of the contractual relationship between employers and employees." *Nat'l Union Fire Ins. Co.* v. *Richman*, 517 N.W.2d 278, 280 (Mich. Ct. App. 1994) (per curiam); *accord Selk* v. *Detroit Plastic Prods.*, 345 N.W.2d 184, 188 (Mich. 1984) ("[T]his Court has characterized workers' compensation as a liability arising out of the contract of employment."); *Lahti* v. *Fosterling*, 99 N.W.2d 490 (Mich. 1959). By operation of law, the WDCA thus "becomes a part of every contract of employment." *Brown*, 360 N.W.2d at 326. This feature of Michigan law is common to many States' workers' compensation schemes.[2]

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[2] See, *e.g.*, *King Mfg.* v. *Meadows*, 127 P.3d 584, 589 (Okla. 2005) ("The right of an employee to compensation arises from the contractual relationship existing between the employee and the employer on the date of injury. The statutes then in force form a part of the contract * * *."); *Krahwinkel* v. *Commonwealth Aluminum Corp.*, 183 S.W.3d 154, 157 (Ky. 2005) ("Workers' compensation coverage is a voluntary contract between employer and employee, the terms of which are defined

Although a State's characterization of particular contracts is not conclusive as to whether they constitute "part of the 'business of insurance' under McCarran-Ferguson" (*Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 369 n.5 (2002)), such classifications are undoubtedly "relevant to the enquiry, because Congress, in leaving the 'business of insurance' to the States, 'was legislating concerning a concept which had taken on its coloration and meaning largely from state law, from state practice, from state usage.'" *Ibid.* (quoting *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959)). The Sixth Circuit accordingly went astray in adopting an approach to the McCarran-Ferguson Act that does not reflect any

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by the provisions of the Act."); *Dodge* v. *Precision Constr. Prods., Inc.*, 820 A.2d 207, 214 (Vt. 2003) ("A worker's right to compensation benefits stems from his employment contract: * * * the Act becomes a part of the contract."); *Allstate Ins. Co.* v. *Eagle-Picher Indus., Inc.*, 410 N.W.2d 324, 328 (Minn. 1987) ("The rights afforded by the Workers' Compensation Act are incidents of the employment relationship and are contractual in nature."); *Yocum* v. *Phillips Petroleum Co.*, 612 P.2d 649, 653 (Kan. 1980) ("The workmen's compensation law has also been held to be contractual in nature * * * with the terms and provisions of the statute being incorporated into the employment contract."); *Turner* v. *S. Wheel & Rim Serv., Inc.*, 332 So. 2d 770, 771 (La. 1976) ("The obligation is a statutory incident to the employment contract, and thus the benefits are awarded upon the theory that the statute is read into and becomes a part of the contract of employment."); *Jones* v. *Laird Found., Inc.*, 195 S.E.2d 821, 824 (W.Va. 1973) ("Workmen's Compensation is contractual in nature, as the provisions of the Workmen's Compensation Act become an integral part of the contract of employment between the employer and employee."); *Glassco* v. *Glassco*, 77 S.E.2d 843, 844 (Va. 1953) ("[T]he statute reads into every contract of employment * * * the obligation of the employer to pay, and the right of the employee or his dependents to recover, such benefits.").

consideration of how Michigan law actually treats workers' compensation benefits.

Had the Sixth Circuit engaged in the proper analysis, it would have concluded that the WDCA is aimed at regulating the business of insurance. As the Michigan courts have long recognized, workers' compensation benefits under the WDCA are a form of "insurance of a social character" between employees and employers, the contractual terms of which are fixed by law. See *Lauder*, 72 N.W.2d at 172. And this Court has repeatedly recognized that state laws regulating the substantive terms of insurance contracts are laws directed at regulating the "business of insurance." *Metro. Life*, 471 U.S. at 743-744. Indeed, "[t]he relationship between insurer and insured" and "the type of policy which could be issued" both lie at the "*core* of the 'business of insurance.'" *SEC* v. *Nat'l Sec., Inc.*, 393 U. S. 453, 460 (1969) (emphasis added). A "mandatory contract term * * * dictates the terms of the relationship between the insurer and the insured, and consequently, is integral to that relationship." *UNUM Life Ins. Co.* v. *Ward*, 526 U.S. 358, 374 (1999) (internal quotation marks omitted). That describes the situation here.[3]

2. The Sixth Circuit also departed from this Court's approach when it concluded that the WDCA

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[3] The Sixth Circuit concluded that an "employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries." App., *infra*, 20a. But the WDCA requires Michigan employers to accept a contractual obligation to compensate injured employees that is quite unlike their duties at common law. Most importantly, employers are no longer entitled to assert defenses like contributory negligence, the fellow servant rule, and assumption of risk. See MICH. COMP. LAWS § 418.141.

was not "enacted * * * for the purpose of regulating the business of insurance" because the "provisions relating to insurance policies within the WDCA were included merely to effectuate the WDCA's primary goal of employee compensation." App., *infra*, 22a. This reasoning rests on a misunderstanding of this Court's reading of the McCarran-Ferguson Act's language, which recognizes that that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance'" is *more* expansive "than just the 'business of insurance.'" *Fabe*, 508 U.S. at 505. Moreover, the court of appeals' analysis is circular, as it rests on the premise – which, as we have suggested, is incorrect – that the transfer of the risk of workplace injuries is not the business of insurance in the first place.[4]

In any event, that the WDCA was intended to protect the general welfare by providing a quick and certain remedy for workplace injuries, as the court of appeals correctly noted (App., *infra*, 21a-22a), hardly means that the legislation was not also meant to govern the resulting insurance relationship. The correct approach is to carefully "parse[] a state statute" with multiple goals. *Fabe*, 508 U.S. at 509 n.8. And here, a "primary purpose of the [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden of these payments to the employer." *Simkins*, 556 N.W.2d at 843.

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[4] Nor is the Sixth Circuit's conclusion established by its observation that the WDCA "is not limited to entities in the insurance industry" (App., *infra*, 21a); a state law is not required to satisfy all three McCarran-Ferguson criteria to qualify as a regulation of the business of insurance. See *Pireno*, 458 U.S. at 129.

The WDCA thus "dictates the terms" of, and is integral to, those elements of the contractual relationship between employees and employers that allocate the risk of workplace injuries. See *UNUM*, 526 U.S. at 374. Its provisions governing the obligation of self-insured employers to pay benefits to eligible employees ensure the performance of the risk-shifting terms that are implied, by operation of law, into every Michigan employment contract. See *Fabe*, 508 U.S. at 503. Respondents' RICO claim therefore implicates a state law enacted for the purpose of regulating the contractual spreading and transfer of risk – that is, the business of insurance.

B. Self-Insurance Is Part Of The Business Of Insurance

The Sixth Circuit also went astray in its related holding – which it labeled "crucial" – that "self-insurance does not relate to the 'business of insurance' under the McCarran-Ferguson Act." App., *infra*, 24a. That understanding led the court to its conclusion that Michigan statutory provisions imposing parallel obligations on insurance companies and self-insurers are immaterial to the McCarran-Ferguson analysis, and that self-insurers are categorically excluded from application of the Act. That insupportable holding substantially undermines the efficacy of the McCarran-Ferguson Act.

1. To begin with, the Sixth Circuit's rule that self-insurance is not "insurance" cannot be squared with this Court's precedent. The conflict is brought into stark relief by two recent decisions of this Court involving challenges to state laws brought by health maintenance organizations (HMOs). See *Kentucky Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. 329

(2003); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355 (2002).[5]

In *Miller*, the Court considered a Kentucky state law requiring health insurers to accept as participating providers any provider willing to abide by the insurer's terms and conditions. 538 U.S. at 331-332. The insurers argued that the law was not "specifically directed toward" insurance because it reached not only traditional health insurers, but also "self-insured * * * plans." *Id.* at 336 n.1 (internal quotation marks omitted). The Court made short shrift of this argument: "[S]elf-insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan." *Ibid.*; see also *Gen. Elec. Co.* v. *Gilbert*, 429 U.S. 125, 138 n.16 (1976) ("That General Electric self-insures does not change the fact that it is, in effect, acting as an insurer * * *.") (superseded by statute on other grounds, as stated in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 676 (1983)).

Similarly, in *Rush Prudential* the petitioner HMO argued that a state statute did not regulate insurance because it was directed at HMOs, which the petitioner maintained were providers of health care services rather than insurers. 536 U.S. at 366-67. The Court was unpersuaded. It explained that an

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[5] Although *Miller* and *Rush Prudential* arose under the Employee Retirement Income Security Act of 1974 (ERISA), they establish that a self-insured entity must, under some circumstances, be treated as an insurer. ERISA preempts state laws that "relate to any employee benefit plan" except those that are "specifically directed toward" insurance. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 50 (1987); 29 U.S.C. § 1144(a), (b)(2)(A).

HMO's defining feature "'is receipt of a fixed fee for each patient enrolled under the terms of a contract to provide specified health care if needed. The HMO thus assumes the financial risk of providing the benefits promised * * *.'" *Id.* at 367 (citation omitted). For this reason, HMOs are "risk-bearing organizations" in that they assume financial responsibility for payment of their enrollees' claims. *Pegram*, 530 U.S. at 219. The contractual arrangement between an HMO and an enrollee transfers risk to the HMO, which in turn distributes that risk over persons (*i.e.*, other enrollees in the HMO's pool) and over time. HMOs therefore "actually underwrite and spread risk among their participants, a feature distinctive to insurance." *Rush Prudential*, 536 U.S. at 367 (citations omitted). That HMOs also provide enrollees their contracted-for benefits (*i.e.*, medical care) does not detract from their "insurance features." *Id.* at 370.[6]

Miller and *Rush Prudential* both reject the Sixth Circuit's formalistic conception of insurance, which focuses on whether there is a traditional insurance policy denominated as such, rather than on whether the practice at issue effects the contractual spreading or transfer of risk. In every respect relevant here, employers who self-insure workers' compensation are identically situated to the HMOs in *Rush Prudential*

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[6] Even an HMO that provides only "medical matchmaker" services between a self-funded plan and health care providers, and does not itself bear any risk, "would fall within the insurance industry." *Rush Prudential*, 536 U.S. at 372, 375. This analysis demonstrates the error of the Sixth Circuit's decision with respect to petitioners Crawford and Margules, because adjusters of insurance claims are entities within the insurance industry. See *Pireno*, 458 U.S. at 134 n.8.

and the self-insured plans in *Miller*: through a contract whose terms are specified by the WDCA, they have assumed responsibility for others' risks (*i.e.*, employees suffering compensable workplace injuries) and undertaken to deliver the contracted-for benefits themselves (*i.e.*, workers' compensation payments). The WDCA's regulation of this contractual relationship is quintessentially a regulation aimed at "adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

The court of appeals' departure from this Court's precedents led the Sixth Circuit to a serious and consequential misunderstanding of the McCarran-Ferguson Act. The court acknowledged that workers' compensation benefits guarantee against the risk of workplace injury by "provid[ing] compensation for injuries like many forms of insurance." App., *infra*, 19a. Employers are obligated to insure against that potential liability, either by purchasing insurance or by self-insuring. The obligations of both sets of employers are identical; indeed, a third-party insurer's obligation is, by statute, derivative of the employer's. See MICH. COMP. LAWS §§ 418.301, 418.315, 418.319, 418.321, 418.621(4). By excluding self-insurers from the McCarran-Ferguson definition of insurance, the court below accordingly adopted a rule that leads to inconsistent treatment of identical risks depending upon whether the employer is self-insured or insured by a third party, and the consequent frustration of state policy relating both to insurance and to workers' compensation.

2. Moreover, the strict dichotomy drawn by the Sixth Circuit between self-insurers and those who purchase insurance disregards the insurance-specific requirements imposed upon self-insurers by States

with workers' compensation systems like Michigan's. It also ignores the practical realities of the "business of insurance" – and of insurance regulation – that makes such a distinction incoherent in the real world. As a consequence, the holding below reads into the McCarran-Ferguson Act an irrational distinction that will be impossible to administer.

The WDCA contains numerous provisions regulating the use of self-insurance to secure payment of workers' compensation benefits. Many self-insured employers, for example, are required to obtain "excess liability insurance, with policy limit and retention acceptable to" the Bureau of Workers' Compensation, before they are permitted to self-insure. MICH. ADMIN. CODE R. 408.43a(3); cf. *Rush Prudential*, 536 U.S. at 371 (explaining that neither a "reinsurance contract" nor insurance "cover[ing] a portion of the risk * * * assume[d]" takes "the primary insurer out of the insurance business"). There can be no doubt that this is insurance in every sense.

Similarly, the WDCA provides for reinsurance of self-insured employers through a Second Injury Fund and self-insurers' security fund. MICH. COMP. LAWS § 418.501(1). The Second Injury Fund is an "insurance scheme" that spreads the risk of certain losses due to "worker's compensation among all the self-insured employers and carriers." *McAvoy* v. *H.B. Sherman Co.*, 258 N.W.2d 414, 429 (Mich. 1977). The self-insurers' security fund "provide[s] a source of compensation benefits following insolvency" of a self-insured employer (*Gomez* v. *Campbell, Wyant & Cannon Foundry*, 259 N.W.2d 400, 402 (Mich. Ct. App. 1977)), and thus shifts "compensation liability of the insolvent self-insured employer" to that fund. *McQueen* v. *Great Markwestern Packing Co.*, 262

N.W.2d 820, 822 (Mich. 1978) (internal quotation marks omitted).

These provisions of the WDCA can only be understood as reflecting the Michigan legislature's determination that self-insured employers should stand in the same shoes as insurance companies vis-à-vis workers' compensation benefits. That judgment reflects the practical realities of the business of insurance: the Sixth Circuit's strict distinction between traditional insurance and self-insurance does not recognize the multitude of arrangements for securing payment of workers' compensation benefits that include elements both self- and paid insurance.[7] The

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[7] As a practical matter, for example, "[e]mployers who have policies with deductibles are, in effect, self-insuring up to the amount of the deductible. That is, they are bearing that portion of the financial risk." National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs*, 2006, at 15-16 (Aug. 2008), available at http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf; FLORENCE KAVALER & ALLEN D. SPIEGEL, RISK MANAGEMENT IN HEALTH CARE INSTITUTIONS, SECOND EDITION: A STRATEGIC APPROACH 118-19 (2003) (discussing growth in "large deductible" plans). Moreover, workers' compensation insurance policies are sold to many employers on an "experience rated" or "retrospectively rated" basis. C. ARTHUR WILLIAMS, JR., AN INTERNATIONAL COMPARISON OF WORKERS' COMPENSATION 192-193 (1991). Under such policies, the "insurer sets a price based on the [employer's] recent and predicted losses," such "that almost all of the time the insured firm pays the full costs of the losses it generate." *Sears, Roebuck & Co.* v. *Comm'r*, 972 F.2d 858, 862 (7th Cir. 1992). And employers often obtain coverage through "rent-a-captives," a self-insurance-like arrangement in which employees' claims are paid out of a segregated account that is funded entirely by the employer's premium payments. Christopher L. Culp, *Alternative Risk Transfer*, *in* RISK MANAGEMENT 374 (Michael Frenkel, et al. eds., 2004); PETER M. LENCSIS, WORKERS COMPENSATION: A REFERENCE AND GUIDE 82 (1998). These ar-

court of appeals' blanket declaration that self-insurance can never relate to the business of insurance therefore rests on a fundamental misunderstanding of the McCarran-Ferguson Act that inevitably will disrupt the state regulation of insurance.

II. RICO ACTIONS BROUGHT BY AGGRIEVED WORKERS' COMPENSATION CLAIMANTS WOULD INTERFERE WITH STREAMLINED STATE ADMINISTRATIVE PROCESSES FOR REDRESSING WORKPLACE INJURIES

As an alternative holding, the Sixth Circuit also reasoned that respondents' RICO claim is "saved from reverse preemption by the WDCA under the McCarran-Ferguson Act because RICO would not 'invalidate, impair, or supersede' the WDCA." App., *infra*, 24a. The rationales relied upon by the Sixth Circuit in support of this conclusion, however, are inconsistent with decisions of this Court. Moreover, the principal basis for the court of appeals' decision on this point – which failed to engage in any independent consideration of the relevant state law – inevitably will lead to the very disruption of state policy that the McCarran-Ferguson Act was designed to avoid.

1. The Sixth Circuit's first rationale for finding no impairment of state law rested on its belief that, "because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance." *Id.* at 26a. Once the analytical error that self-insurance never constitutes insurance is corrected, this reasoning has no independent sali-

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rangements demonstrate that clear lines cannot be drawn between those who self-insure and those who purchase insurance.

ence. Because the WDCA effects a contractual transfer of risk from employees to employers (self-insured or not), and because that transfer of risk is disrupted by RICO liability, the Sixth Circuit was wrong to altogether foreclose the possibility of impairment of state law within the meaning of the McCarran-Ferguson Act.

2. The Sixth Circuit's other ground for rejecting petitioners' impairment argument was its observation that the "WDCA provision regarding sanctions for failure to pay benefits does not appear to contemplate the *fraudulent* denial of worker's compensation benefits." *Id.* at 27a. The court thus took the absence of a WDCA provision expressly addressing fraudulent denial of benefits to mean that "a RICO suit would not contravene any '*declared* state policy or interfere with [the state's] administrative regime.'" *Ibid.* (quoting *Humana*, 525 U.S. at 310 (emphasis added by the court of appeals)). In reaching this conclusion, the court engaged in no independent review of the relevant state law to determine whether an action for fraudulent denial of workers' compensation benefits in fact is available in Michigan (see *id.* at 26a-27a), instead finding support in the State of Michigan's failure to file a brief below as an *amicus*. This analysis is wrong in several respects.

First, the Sixth Circuit appears to have conflated the question whether Michigan has a policy *permitting* what federal law forbids with whether allowing a RICO suit to go forward would interfere with Michigan's *administrative regime* for addressing workers' compensation claims. Cf. *Humana*, 525 U.S. at 310 (federal law impairs state law if its application would "frustrate any declared state policy *or* interfere with a State's administrative regime") (em-

phasis added). Fraudulent denial of workers' compensation benefits as part of a racketeering scheme doubtless would violate Michigan law (although petitioners vigorously deny that they engaged in any such scheme). But this does not end the inquiry. Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Humana*, 525 U.S. at 309.

Second, allowing respondents to bring a RICO suit would in fact disrupt Michigan's carefully calibrated system of remedies for aggrieved workers' compensation claimants. The Sixth Circuit itself noted that the WDCA makes workers' compensation "the exclusive remedy [for workplace injuries] except in cases of intentional torts." App., *infra*, 22a; see also MICH. COMP. LAWS § 418.631 (revoking insurance license or privilege of self-insurance if party "repeatedly or unreasonably fails to pay promptly claims"); *id.* § 418.801(2) (penalties, capped at $1500, if benefits are not paid "within 30 days after becoming due and payable"); *id.* § 418.847 (initial hearing procedure); *id.* § 418.859a (claims for review with appellate commission); *id.* § 418.861b (authorizing "disciplinary action" if "claim was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was meritorious issue to be determined"). The WDCA channels "*[a]ny* dispute or controversy concerning compensation or other benefits" to the Bureau of Worker's Compensation and provides that "*all* questions arising under [the WDCA] shall be determined" by that body or its designee. *Id.* § 418.841(1) (emphasis added). That includes, of course, all questions of "liability * * * regarding a claim under" the WDCA. *Id.* § 418.852(1);

Sewell v. *Clearing Mach. Corp.*, 347 N.W.2d 447, 450 (Mich. 1984) (per curiam).

The court of appeals failed to appreciate the significance of this regime because it does not appear to have engaged in any independent review of Michigan law – which would have revealed that *fraudulently* denied workers' compensation benefits are a subset of the broader category of *erroneously* denied benefits. Contrary to the Sixth Circuit's reasoning, there is no lacuna in the WDCA into which a fraudulent denial of workers' compensation claims would fall; fraud claims are treated in the same manner as any other claim that an employee has been denied benefits to which he or she is legally entitled. Michigan law commits all such questions of eligibility for workers' compensation benefits to the Bureau of Worker's Compensation. See MICH. COMP. LAWS § 418.841(1); *Maglaughlin* v. *Liberty Mut. Ins. Co.*, 267 N.W.2d 160, 161 (Mich. Ct. App. 1978).

Michigan does not provide a separate cause of action (common law or statutory) for challenging the intentional withholding of workers' compensation benefits. It does not, for example, permit an action for intentional infliction of emotional distress to be maintained when the allegation is that workers' "compensation benefits were wrongfully terminated * * * in order to further some ulterior motive" of the parties responsible for their payment. *Lisecki* v. *Taco Bell Rests., Inc.*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) (per curiam); *Hajciar* v. *Crawford & Co.*, 369 N.W.2d 860, 864 (Mich. Ct. App. 1985) (per curiam). Thus, even allegations that the defendants "acted in collusion to 'wrongfully, wilfully and intentionally' deprive" the employee of benefits (*Lisecki*, 389 N.W.2d at 174), or that benefits were terminated to

coerce the employee into settling his claim for a lump sum (*Hajciar*, 369 N.W.2d at 861, 864), do not give rise to a judicially cognizable claim under Michigan law.[8] Michigan courts instead have held that the proper "remedy for the * * * [allegedly wrongful] termination of benefits" is the "filing of a petition for hearing with the Bureau of Worker's Disability Compensation." *Lisecki*, 389 N.W.2d at 175.[9] In this respect, Michigan's regime is typical of state workers' compensation systems.[10]

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[8] See also *Atkinson* v. *Farley*, 431 N.W.2d 95, 97 (Mich. Ct. App. 1988) ("wrongful, bad faith termination of benefits" did not "support a claim"); *Wright* v. *DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 844-845 & n.9 (E.D. Mich. 2002) ("[W]rongful, even bad faith refusal to offer benefits to which [the employer] is entitled is not tortious.").

[9] Many of the respondents in this very case have exercised that option and have been awarded workers' compensation benefits.

[10] Many workers' compensation systems, like that of Michigan, have administrative penalties for non-payment of benefits. And "[a] majority of courts have taken the view that [the provision of an administrative penalty] evidences a legislative intent that the remedy for delay in payments, even vexatious delay, shall remain within the system." LARSON ON WORKERS' COMPENSATION § 104.05[3], at 35 (2007). See, *e.g.*, *Breton* v. *Travelers Ins. Co.*, 147 F.3d 58, 61, 63 (1st Cir. 1998) (applying Maine law) ("[W]e think that the existence of a sum of money—albeit a small sum [$50 per day]—payable to the benefits claimant evidences the legislature's intent to confine disputes over delayed payments and other allegations of claims mishandling to the jurisdiction of the workers' compensation system."); *Cianci* v. *Nationwide Ins. Co.*, 659 A.2d 662 (R.I. 1995) ("Such a [statutory administrative] penalty is evidence of a legislative intent that the remedy for delay in payments should remain in the workers' compensation system * * *."); *Bergeron* v. *N. Am. Underwriters, Inc.*, 549 So.2d 315, 315 (La. 1989) (per curiam) ("The sole remedy for arbitrary failure to pay worker's compensation benefits is the recovery of penalties and attorney's fees * * *.");

Third, the Sixth Circuit missed all this because it evidently regarded as dispositive the absence of any state statutory provision *expressly* precluding suit for the fraudulent denial of benefits. But this approach is in conflict with *Humana* itself, in which this Court engaged in a close examination of Nevada law – including a review of the remedies that actually were available – to determine that a RICO suit would not impair that state's regulatory regime because "Nevada provides both statutory and common-law remedies to check insurance fraud" and "[v]ictims of insurance fraud may also pursue private actions" under the Unfair Insurance Practices Act. 525 U.S. at 311-312. Given the "existence of private rights of action under state law" and the availability of punitive damages under those causes of action, it was clear that RICO "complement[ed]" Nevada's regulatory scheme instead of impairing it. *Id.* at 312-13 & n.10.

The holding below also conflicts with the approach taken by other courts of appeals, which have followed *Humana* by engaging in a close review of the remedies available under state law – and have

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Phillips v. *Crawford & Co.*, 248 Cal. Rptr. 371, 373 (Cal. Ct. App. 1988) (10% penalty); *Garrett* v. *Washington Air Compressor Co., Inc.*, 466 A.2d 462, 464 (D.C. 1983) (10% fine); *Messner* v. *Briggs & Stratton Corp.*, 353 N.W.2d 363, 365-366 (Wis. Ct. App. 1984); *Hormann* v. *New Hampshire Ins. Co.*, 689 P.2d 837, 843-844 (Kan. 1984) (8% interest); *Bright* v. *Nimmo*, 320 S.E.2d 365, 368 (Ga. 1984) (15% penalty). But see *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991) (allowing action for wrongful non-payment but recognizing "the contrary position taken by a number of other courts and commentators who have concluded that a legislative scheme of administrative fines is the exclusive remedy for injured workmen who have been aggrieved by the bad faith or negligence of a self-insured employer in the processing and payment of claims for compensation").

held RICO suits reverse preempted by the McCarran-Ferguson Act when the State did not provide remedies comparable to those available under RICO. See, *e.g.*, *Saunders* v. *Farmers Ins. Exchange*, 537 F.3d 961, 967-969 (8th Cir. 2008); *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999). See also *Weiss* v. *First Unum Life Ins. Co.*, 482 F.3d 254, 268-269 (3d Cir. 2007) (no reverse preemption in light of available state remedies) *BancOklahoma Mortgage Corp.* v. *Capital Title Co.*, 194 F.3d 1089, 1099-1100 (10th Cir. 1999) (same).

The Sixth Circuit should have reached that conclusion in the face of Michigan's essentially closed system for handling workers' compensation claims. MICH. COMP. LAWS § 418.131 (exclusivity of remedy); § 418.841 (exclusive jurisdiction); § 418.861 (administrative findings of fact conclusive); see *Hebert* v. *Ford Motor Co.*, 281 N.W. 374, 375 (Mich. 1938) ("Proceedings under the workmen's compensation act are * * * []administrative, not judicial, []inquisitorial, not contentious, []disposed of not by litigation and ultimate judgment, but summarily."). Allowing plaintiffs to re-litigate workers' compensation disputes through RICO and to invoke the federal statute's exceptionally powerful remedies would impair Michigan's carefully developed administrative remedial scheme.

III. THE QUESTIONS PRESENTED ARE ONES OF SUBSTANTIAL PRACTICAL SIGNIFICANCE

The issues presented here are ones of enormous practical importance: the court of appeals' holding reads significant limits into the McCarran-Ferguson Act, threatening to interfere with state insurance regulation and overturn the balance struck by States

in their workers' compensation systems. Most obviously, by categorically holding that state regulation of employers who self-insure their workers' compensation liability is outside the scope of the McCarran-Ferguson Act, the holding below invites a proliferation of RICO strike suits brought by aggrieved workers' compensation claimants. The attractiveness of RICO's remedies – including treble damages and attorney's fees, *e.g.*, 18 U.S.C. § 1964(c) – and the extraordinarily burdensome nature of RICO discovery assures that an ever-increasing volume of workers' compensation litigation will find its way to federal court for decision under federal law. See, *e.g.*, Cristin Schmitz, *Employers Face RICO Claims For Workers Comp Denials*, INSIDE COUNSEL (Feb. 1, 2009) (RICO permits "wide-open" discovery; plaintiffs' counsel states that if case goes to trial, "I am going to discover every single comp claim that ever existed in the past four years * * * so it's going to open a real can of worms"). To the extent that settlements are not compelled in such suits, federal courts will have to pass on the merits of the underlying workers' compensation claims, creating the potential for overlapping (and possibly conflicting) adjudication of eligibility for workers' compensation benefits.

Such an outcome would disrupt Congress's allocation of responsibility between the States and the federal government in matters of insurance regulation. See *Fabe*, 508 U.S. at 505. The broad availability of these claims would allow plaintiffs to circumvent the policy choices made by state legislatures and insurance regulators in favor of one-size-fits-all federal RICO claims. This is of particular consequence in the field of workers' compensation, which historically has been intended to "substitut[e] * * * a simple and inexpensive scheme for securing a

prompt settlement of claims" for costly and protracted judicial proceedings. 9A COUCH ON INSURANCE § 133:13 (2008 ed.); see also 28 U.S.C. § 1445(c) (forbidding removal of workers' compensation benefits claims to federal court).[11] Superimposing the federal RICO remedy onto that system would, at best, distort the state process by adding a new layer of satellite litigation to what had been a streamlined administrative regime; at worst, it would render "obsolete" the efficiencies of workers' compensation. *Bristol Hotel Mgmt. Corp.* v. *Aetna Cas. & Sur. Co.*, 20 F. Supp. 2d 1345, 1351 (S.D. Fla. 1998).

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[11] See, *e.g.*, *Dep't of Labor & Indus.* v. *Granger*, 153 P.3d 839, 843 (Wash. 2007) (en banc) (workers' compensation "is a self-contained system that provides specific procedures and remedies for injured workers"); *Davis* v. *Fayette County Comm'n*, 831 So. 2d 50, 53 (Ala. Civ. App. 2002) ("The Act is a specific and comprehensive system of law for dealing with workplace injuries. As such, it trumps general laws that might, at first glance, seem to apply."); *Maryland Cas. Co.* v. *Messina*, 874 P.2d 1058, 1063 (Colo. 1994) (en banc) ("The Workers' Compensation Act establishes an administrative process designed to adjudicate promptly a narrow issue of law containing limited legal questions[.]"); *Zundell* v. *Dade County Sch. Bd.*, 636 So. 2d 8, 12 (Fla. 1994) ("Workers' compensation is an administrative remedy designed to speed an employee's compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial proceedings."); *Sheets* v. *Hill Bros. Distribs., Inc.*, 379 S.W.2d 514, 516 (Mo. 1964) ("'The compensation act * * * is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy * * * [that] is wholly substitutional in character and supplants all other rights and remedies, at common law or otherwise.'"); *Crow* v. *City of Wichita*, 566 P.2d 1, 9 (Kan. 1977) ("[T]he Workers' Compensation Act is complete and exclusive within itself in establishing procedures covering every phase of the right to compensation * * *.").

The significance of such a rule cannot be denied. Even if limited to the industrialized States of the Sixth Circuit, the number of annual workers' compensation claims is enormous. And more broadly, in 2006, 130 million workers across the Nation were covered by workers' compensation programs. National Academy of Social Insurance, *Workers' Compensation*, *supra*, at 2. With the exceptions of North Dakota and Wyoming, which require employers to obtain coverage from state-run funds, every State allows financially eligible employers to self-insure their liability for workers' compensation benefits. *Id.* at 14. An increasing number of employers have opted for self-insurance; as of 2006, 24% of workers' compensation benefits were directly paid by self-insured employers. *Ibid.* The number of claims potentially affected by the rule announced below therefore is staggering. Because that rule is inconsistent with this Court's decisions in significant respects, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2009

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States Court of Appeals for the Sixth Circuit

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT CO., CRAWFORD & COMPANY, AND DR. SAUL MARGULES

Defendants-Appellees.

No. 05-2089

Argued July 27, 2006.

Decided Oct. 23, 2008.

BEFORE: MOORE and GIBBONS, Circuit Judges; and ACKERMAN, District Judge.*

KAREN NELSON MOORE, Circuit Judge.

This case involves the dismissal of the claims of Plaintiffs-Appellants Paul Brown, William Fanaly, Charles Thomas, Gary Riggs, Robert Orlikowski, and Scott Way (collectively referred to as "plaintiffs") against Defendants-Appellees Cassens Transport Company ("Cassens"), Crawford & Company ("Crawford"), and Dr. Saul Margules (collectively referred to

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* Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

as "defendants") under Federal Rule of Civil Procedure 12(b)(6). The plaintiffs alleged that the defendants employed mail and wire fraud in a scheme to deny them worker's compensation benefits under the Michigan Worker's Disability Compensation Act ("WDCA"), MICH. COMP. LAWS § 418.301, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961(1)(B), 1962(c), 1964(c), and that the defendants' conduct constituted intentional infliction of emotional distress ("IIED") under Michigan law. The plaintiffs appealed the district court's dismissal of their RICO claims based on the reverse preemption of the RICO claims under the McCarran-Ferguson Act, 15 U.S.C. § 1012, and for failure to plead certain claims with particularity, for failure to allege a pattern of racketeering activity, and for failure to plead reliance on the defendants' fraud. A divided panel of this court affirmed the district court's dismissal of plaintiffs' RICO claims because plaintiffs had failed to plead detrimental reliance on alleged misrepresentations of defendants. The Supreme Court vacated our judgment and remanded for further consideration in light of *Bridge* v. *Phoenix Bond & Indemnity Co.*, ___ U.S. ___, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008), which held unanimously that a civil-RICO plaintiff does not need to show that it detrimentally relied on the defendant's alleged misrepresentations.

On remand, we **REVERSE** the district court's dismissal of plaintiffs' RICO claims because the WDCA does not preempt their RICO claims and because plaintiffs have sufficiently pleaded a pattern of racketeering activity given that reliance is not an element of a civil RICO fraud claim. We **REMAND** to the district court for further proceedings consistent with this opinion. The plaintiffs also appeal the

district court's dismissal of their IIED claims for failure to plead outrageous conduct. We **AFFIRM** the dismissal of the IIED claims because the alleged conduct of these defendants could not be deemed outrageous under Michigan law.

I. BACKGROUND

Plaintiffs are current or former employees of Cassens who have submitted worker's compensation claims to Cassens based on workplace injuries they have each sustained. On June 22, 2004, plaintiffs filed a complaint raising RICO and IIED claims against the defendants. Plaintiffs alleged that Cassens, which was self-insured for purposes of paying benefits under the WDCA, contracted with Crawford to serve as a claims adjuster for the worker's compensation claims of Cassens's employees. They further pleaded that Cassens, Crawford, and Margules, as well as other "cut-off" doctors, engaged in a pattern of racketeering activity that denied the plaintiffs' worker's compensation claims. Specifically, the plaintiffs alleged that Cassens and Crawford deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions that would support the denial of worker's compensation benefits, and that defendants ignored other medical evidence in denying them benefits. The plaintiffs claimed that the defendants made fraudulent communications amongst themselves and to the plaintiffs by mail and wire in violation of 18 U.S.C. §§ 1341, 1343, which serve as the predicate acts for their RICO claims.

The district court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6) on July 15, 2005. *Brown* v. *Cassens Transp. Co.*, 409 F. Supp. 2d 793 (E.D. Mich. 2005). The plaintiffs filed this timely

appeal.[1] A majority of this panel affirmed the dismissal on the ground that plaintiffs failed to plead that they relied on misrepresentations by defendants. *Brown* v. *Cassens Transp. Co.*, 492 F.3d 640, 643, 646 (6th Cir. 2007). The U.S. Supreme Court granted plaintiffs' petition for a writ of certiorari, vacated our judgment, and remanded the case to us for reconsideration in light of *Bridge*. *Brown* v. *Cassens Transp. Co.*, ___ U.S. ___, 128 S. Ct. 2936, 171 L. Ed. 2d 862 (2008).

II. STANDARD OF REVIEW

We review de novo a district court's determination dismissing a suit for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). *Hill* v. *Blue Cross & Blue Shield*, 409 F.3d 710, 716 (6th Cir. 2005). The plaintiffs' factual allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiffs. *Id.* We will not affirm the district court's dismissal of a complaint on Rule 12(b)(6) grounds "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Id.* (alteration in original) (internal quotation marks omitted).

III. DISMISSAL OF THE CLAIMS OF THOMAS AND RIGGS FOR FAILURE TO STATE A PATTERN

A. General Contours of the RICO Pattern Element and the District Court's Approach

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[1] The plaintiffs filed a motion for leave to file an amended complaint, but they did not appeal the district court's denial of this motion in their Notice of Appeal. Therefore, that decision is not before us. FED. R. APP. P. 3(a)(1).

RICO makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: ... section 1341 [18 U.S.C. § 1341] (relating to mail fraud), section 1343 [18 U.S.C. § 1343] (relating to wire fraud)." *Id.* § 1961(1). Plaintiffs claim that defendants engaged in the racketeering activities of mail and wire fraud.[2]

RICO states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). On this basis, the district court assumed that alleging two acts of racketeering activity was sufficient to state a pattern, and dismissed the claims of Riggs and Thomas because they sufficiently pleaded only one act each of racketeering activity. The plaintiffs appeal this conclusion, claiming that the district court was instead required "to look at the pattern of defendants' alleged scheme against the group" rather than "the number of predicate acts al-

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[2] Plaintiffs also pleaded that defendants engaged in witness tampering in violation of 18 U.S.C. § 1512, which also constitutes a predicate act of racketeering under RICO, *see* 18 U.S.C. § 1961(1)(B). The district court dismissed the witness-tampering claims, and plaintiffs do not press these claims on appeal.

legedly committed against each victim." Appellants Br. at 25-26.

B. The District Court Erred by Focusing on the Number of Predicate Acts Alleged by Each Plaintiff

RICO's provision authorizing civil suits, 18 U.S.C. § 1964(c), sheds light on the issue of predicate acts. Section 1964(c) states that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]" may bring a RICO suit. RICO specifies only that the defendant must have engaged in a "pattern of racketeering activity" to violate 18 U.S.C. § 1962. As long as the defendant engaged in a pattern of racketeering activity, and the plaintiff was injured by this pattern of activity, this suffices to state a claim under 18 U.S.C. § 1964(c); nowhere does the statute require that the injury to each plaintiff must have independently consisted of a pattern of activity by the defendant. *See H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 250, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (looking only to the activities of defendants and not the number of predicate acts against each plaintiff in assessing whether a pattern of racketeering was sufficiently pleaded); *Vild* v. *Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992) ("We do not hold that a civil RICO plaintiff must necessarily be directly harmed by all the alleged predicate acts, because harm from one enumerated violation may, in certain situations, be sufficiently connected."). Therefore, the district court erred in assessing the pattern requirement by counting the number of predicate acts alleged by each plaintiff. Rather, the district court should have considered whether the plaintiffs sufficiently pleaded that the defendants were engaged in a "pattern of racketeering activity," and, if

so, whether they also sufficiently pleaded that each plaintiff was injured by this pattern of activity.

Although the defendants do not appear to take issue with the district court's holding that two predicate acts constitute a "pattern of racketeering activity," and thus that a pattern was specifically pleaded by Brown, Fanaly, Way, and Orlikowski,[3] *see* Appellees Br. at 16 (requesting that the district court's decision on whether a pattern was established be upheld), we must consider whether the defendants were engaged in a "pattern of racketeering activity" to determine whether the district court erred in dismissing the claims of Riggs and Thomas for failure to state a pattern.

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[3] The district court's treatment of Orlikowski's claim is confused. The district court noted that Orlikowski "fails to specify the means of the communication" with regard to one of the two predicate acts he alleges, *Brown*, 409 F. Supp. 2d at 806 (commenting on the allegation in paragraph fifty-seven), and thus does not satisfy the requirement under Federal Rule of Civil Procedure 9(b) that a plaintiff allege, at a minimum, "the time, place and contents of the misrepresentation(s)," *Bender* v. *Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). However, the district court simply dismissed the claims of Thomas and Riggs for failure to plead a "'pattern of racketeering activity'" on the ground that each alleged only one predicate act of fraud directed at him. *Brown*, 409 F. Supp. 2d at 806. Given the district court's apparent conclusion that only one of Orlikowski's two alleged predicate acts was sufficiently pleaded, it is not clear why the district court dismissed solely the claims of Thomas and Riggs for failure to plead a pattern. Ultimately, the district court's view of Orlikowski's claims is immaterial because, as we later make clear, Orlikowski has sufficiently pleaded a RICO pattern on the basis of the alleged conduct of the defendants, regardless of the precise number of acts he alleges relate specifically to him.

C. Defining a Pattern of Activity Under RICO: Relationship and Continuity

The district court's assumption that two predicate acts constitute a pattern under 18 U.S.C. § 1961(5) in finding a pattern with regard to the claims of Brown, Fanaly, Way, and Orlikowski fails to heed the Supreme Court's definition of "pattern" set forth in *H.J. Inc.*, 492 U.S. at 238-43, 109 S. Ct. 2893. In *H.J. Inc.*, the Supreme Court held that "while two [predicate] acts are necessary, they may not be sufficient." *Id.* at 237, 109 S. Ct. 2893 (internal quotation marks omitted). Beyond setting forth the minimum number of predicate acts required to establish a pattern, § 1961(5) "assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts involved." *H.J. Inc.*, 492 U.S. at 238, 109 S. Ct. 2893. "Congress intended to take a flexible approach" to satisfying whatever is required beyond the minimum number of predicate acts, "and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." *Id.* Within the numerous sorts of relationships that can constitute a pattern, two elements must be shown: "that the racketeering predicates are *related, and* that they amount to or pose a threat of *continued* criminal activity." *Id.* at 239, 109 S. Ct. 2893 (first and third emphases added).

A relationship among predicate acts is established when they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240, 109 S. Ct. 2893 (internal quotation marks omitted). The "use of the disjunctive suggests that the

Court meant to craft a broad test of relatedness." *United States* v. *Blandford,* 33 F.3d 685, 703 (6th Cir. 1994).

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.,* 492 U.S. at 241, 109 S. Ct. 2893. Continuity may be demonstrated in a number of ways. Closed-ended continuity can be shown "by proving a series of related predicates extending over a substantial period of time." *Id.* at 242, 109 S. Ct. 2893. Determining whether open-ended continuity has been established requires a court to probe "the specific facts of each case." *Id.*"A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Id.* Even when "the number of related predicates involved may be small and they may occur close together in time," if "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future," this "suppl[ies] the requisite threat of continuity." *Id.* A "threat of continuity may [also] be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* Therefore, "the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 242-43, 109 S. Ct. 2893. In addition, "[t]he continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or par-

ticipating in an ongoing and legitimate RICO 'enterprise.' " *Id.* at 243, 109 S. Ct. 2893 (footnote omitted).

D. The Plaintiffs Have Pleaded a Pattern

The plaintiffs have pleaded with sufficient particularity at least thirteen predicate acts, which are comprised of allegedly fraudulent communications by mail and wire, including communications among the defendants and communications from the defendants to the plaintiffs relating to each of the plaintiffs' injuries and claims for benefits under the WCDA. Therefore, plaintiffs have met the minimum two-predicate-acts requirement. *See* 18 U.S.C. § 1961(5); *H.J. Inc.*, 492 U.S. at 237, 109 S. Ct. 2893. The question remains as to whether the plaintiffs have satisfied *H.J. Inc.*'s relationship-plus-continuity standard. We conclude that they have.

First, the predicate acts alleged by the plaintiffs are related. They have the same purpose: to reduce Cassens's payment obligations towards worker's compensation benefits by fraudulently denying worker's compensation benefits to which the employees are lawfully entitled. They have the same result: to deny worker's compensation benefits to certain Cassens's employees who are entitled to such benefits under Michigan law. They have the same participants: alleged in the complaint are worker's compensation officials at Cassens and Crawford, including Tina Litwiller, a claim adjuster for Crawford, and Margules, a doctor who the plaintiffs allege, with regard to some of the predicate acts, fraudulently recommended ineligibility of benefits at the request of Cassens and Crawford. They have the same victims: alleged in the complaint are certain Cassens employees who are eligible for worker's compensation benefits. They have similar methods of commission:

fraudulent misapplication of the legal standards set forth in the WDCA in denying worker's compensation benefits to Cassens's employees by Titwiller, other officials working for defendants, or Margules.

Second, the predicate acts are continuous under either a closed- or open-ended theory. "[P]laintiff[s] may prove [closed] continuity by showing a series of past related predicates occurring over an extended period of time," generally more than "[a] few months." *Vild,* 956 F.2d at 569; *see also H.J. Inc.,* 492 U.S. at 242, 109 S. Ct. 2893 (noting that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement"). The plaintiffs have alleged a series of related predicate acts that span well over three years. This constitutes a period of closed-ended continuity.

As for open-ended continuity, the Supreme Court has explained that an open period of continuity is stated when "the predicates are a regular way of conducting defendant's ongoing legitimate business." *H.J. Inc.,* 492 U.S. at 243, 109 S. Ct. 2893. The plaintiffs allege precisely that. Specifically, the plaintiffs allege that the legitimate business or part of the legitimate business of each of the defendants—addressing its employees worker's compensation claims for Cassens, worker's compensation claim administration on behalf of Cassens for Crawford, and offering his medical opinion on worker's compensation claims for Margules—is regularly conducted by fraudulently denying benefits to which the employees are entitled through the use of fraudulent communications by mail and wire. Although the plaintiffs do not specifically allege that this conduct is ongoing, given that "the threat of continuity need

not be established solely by reference to the predicate acts alone," and that "facts external to the predicate acts may, and indeed should, be considered," *United States* v. *Busacca,* 936 F.2d 232, 238 (6th Cir. 1991) (explaining that "the totality of the circumstances surrounding the commission of the predicate acts are considered to determine whether those acts pose a threat of continuing criminal activity"), the plaintiffs' allegations also state a period of open continuity.

Each of the plaintiffs has also sufficiently pleaded that they were injured by the defendants' "pattern of racketeering activity" under 18 U.S.C. § 1964(c) because the defendants' fraud deprived the plaintiffs of worker's compensation benefits and caused them to incur attorney fees and medical care expenses.[4]

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[4] Federal Rule of Civil Procedure 9(b)'s requirement that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake" has been applied to allegations of fraud made in support of a RICO claim. *See, e.g., Blount Fin. Servs., Inc.* v. *Walter E. Heller & Co.,* 819 F.2d 151, 152-53 (6th Cir. 1987). Rule 9(b) has been construed to require a plaintiff to allege, at a minimum, "the time, place and contents of the misrepresentation(s)." *Bender,* 749 F.2d at 1216. On this basis, the district court dismissed the allegations set forth in paragraphs 12, 16A, 24, 32, 34, and 57 of the complaint for lack of the requisite particularity under Rule 9(b). The plaintiffs argue that this ruling was in error because, under Federal Rule of Civil Procedure 11(b)(3), these allegations "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," and because the defendants had exclusive possession of the particular details related to these allegations of fraud.

The plaintiffs contend that under Rule 11(b)(3) and *Rotella* v. *Wood,* 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000), the district court should have afforded them the opportunity for discovery to flesh out the details of these allegations

IV. RELIANCE AS AN ELEMENT OF FRAUD IN A CIVIL RICO CLAIM

A. Reliance Is Not Required for a Civil RICO Fraud Claim

The Supreme Court recently held "that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation,

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before dismissing them. In *Rotella*, a civil RICO suit alleging fraud, the Supreme Court explained that Rule 11(b)(3) provides "flexibility, ... allowing pleadings based on evidence reasonably anticipated after further investigation or discovery." *Rotella*, 528 U.S. at 560, 120 S. Ct. 1075 (citing *Corley* v. *Rosewood Care Ctr., Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998)). In rejecting the plaintiffs' position, the district court stated that "while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation." *Brown*, 409 F. Supp. 2d at 805. In light of our holding that the plaintiffs have successfully pleaded a "pattern of racketeering activity" *without* considering the dismissed allegations and the liberal amendment standard under Federal Rule of Civil Procedure 15(a), *Tucker* v. *Union of Needletrades, Indus., & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005), we need not consider the correctness of the district court's ruling in dismissing these allegations for lack of particularity. We express no view as to whether the district court should have permitted the plaintiffs to plead additional particular facts after discovery under Rule 11(b)(3), other than to note that such a notion is not foreign to this court. *See Michaels Building Co.* v. *Ameritrust Co.*, 848 F.2d 674, 679-81 (6th Cir. 1988) (holding that plaintiffs alleging RICO civil fraud claims that failed to satisfy Rule 9(b)'s particularity requirement were entitled to opportunity for discovery under Rule 11(b)(3) before their claims were dismissed). Should discovery confirm the plaintiffs' initial beliefs regarding the fraudulent nature of the dismissed allegations and provide the necessary details to satisfy Rule 9(b), the plaintiffs can then amend the complaint to replead the dismissed allegations. *See* FED. R. CIV. P. 15(a); *Tucker*, 407 F.3d at 788.

that it relied on the defendant's alleged misrepresentations." *Bridge* v. *Phoenix Bond & Indem. Co.*, ___ U.S. ___, 128 S. Ct. 2131, 2145, 170 L. Ed. 2d 1012 (2008). Resolving a circuit split, the Court unanimously determined that "first-party reliance is [not] an element of a civil RICO claim predicated on mail fraud." *Id.* at 2137. The Court found that neither the statute nor common-law rules or policy arguments provided a basis for imposing a first-party reliance requirement. *Id.* at 2139. *See also Chaz Concrete Co.* v. *Codell*, 545 F.3d 407, 2008 WL 4629907, at *2 (6th Cir. 2008).

In addition to rejecting a reliance requirement, the Court in *Bridge* also reaffirmed its position in *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), that 18 U.S.C. § 1964(c) "requires the plaintiff to establish proximate cause in order to show injury 'by reason of' a RICO violation.'" *Bridge*, 128 S. Ct. at 2141. The Court reiterated that this "'demand[s] ... some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 2142 (quoting *Holmes*, 503 U.S. at 268, 112 S. Ct. 1311). Nonetheless, although first-party reliance might be useful in showing proximate causation, "'the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action.'" *Id.* at 2144 (quoting *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 478, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006) (Thomas, J., concurring in part and dissenting in part)).

After *Bridge*, plaintiffs need not plead or prove that they relied on defendants' alleged misrepresen-

tations in order to establish the elements of their civil RICO claim based on mail or wire fraud. Dismissal of plaintiffs claims on this basis cannot be sustained.

B. Plaintiffs Have Sufficiently Pleaded that Their Injuries Were "By Reason of" the Defendants' Alleged Fraud

Plaintiffs have sufficiently pleaded that the defendants' fraud was directly related to and was the proximate cause of their injuries as required by 18 U.S.C. § 1964(c) under *Holmes,* 503 U.S. at 268, 112 S. Ct. 1311, and *Anza,* 547 U.S. at 456-61, 126 S. Ct. 1991. Accepting the facts as recited in the complaint, the defendants' fraudulent acts were a "substantial and foreseeable cause" of the injuries alleged by the plaintiffs: the deprivation of their worker's compensation benefits and expenses for attorney fees and medical care. *Trollinger* v. *Tyson Foods, Inc.,* 370 F.3d 602, 615 (6th Cir. 2004) (explaining, in a RICO case, that proximate cause is shown when "the wrongful conduct [is] a substantial and foreseeable cause" of the injury and the relationship between the wrongful conduct and the injury is "logical and not speculative"). The "direct causal connection" requirement has been met, as no "intricate, uncertain" inquiries are required to link the defendants' alleged fraud and the plaintiffs' injuries. *Anza,* 547 U.S. at 460, 126 S. Ct. 1991.

V. REVERSE PREEMPTION UNDER THE MCCARRAN-FERGUSON ACT

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating

the business of insurance, ... unless such Act specifically relates to the business of insurance." "The McCarran-Ferguson Act thus precludes application of a federal statute in face of state law 'enacted ... for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana, Inc.* v. *Forsyth*, 525 U.S. 299, 307, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999) (alteration in original) (quoting 15 U.S.C. § 1012(b)). The district court concluded that the WDCA reverse preempts RICO under the McCarran-Ferguson Act because RICO does not "relate to the business of insurance," the WDCA was enacted to regulate the business of insurance, and RICO would impair the WDCA. *Brown*, 409 F. Supp. 2d at 808-11. The plaintiffs appeal this conclusion, arguing that WDCA was not enacted to regulate the business of insurance and that RICO will not "invalidate, impair, or supersede" the WDCA.[5]

A. The WDCA Was Not Enacted for the Purpose of Regulating the Business of Insurance

The Supreme Court has explained that "'[s]tatutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the business of insurance,' within the meaning of the phrase [used by McCarran-Ferguson]." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 501, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993) (alteration in original) (quoting *SEC* v. *Nat'l Secs., Inc.*, 393 U.S. 453, 460, 89 S. Ct.

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[5] The parties agree that RICO does not "specifically relate[ ] to the business of insurance." 15 U.S.C. § 1012(b).

564, 21 L. Ed. 2d 668 (1969)). The Supreme Court has also emphasized that

> the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders: "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement-these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was-it was on the relationship between the insurance company and the policyholder."

Id. (quoting *Nat'l Secs.*, 393 U.S. at 460, 89 S. Ct. 564).

In determining whether particular practices constitute "'the *business of* insurance'" under the McCarran-Ferguson Act, three factors are considered: "'*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'" *Ky. Ass'n of Health Plans, Inc.* v. *Miller* 538 U.S. 329, 339, 123 S. Ct. 1471, 155 L. Ed. 2d 468 (2003) (quoting *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S.119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)).[6] No one factor

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[6] The plaintiffs err by asserting that "'a state law regulates insurance if a common sense meaning of the language of the statute indicates that it is specifically directed toward [the insur-

is determinative. *Pireno,* 458 U.S. at 129, 102 S. Ct. 3002.

In assessing whether a state law addresses "the business of insurance" under the McCarranFerguson Act, the Supreme Court has made clear that the focus is on "how to characterize *conduct* undertaken by private actors," rather than "how to characterize *state laws* in regard to what they 'regulate.'" *Ky. Ass'n of Health Plans, Inc.,* 538 U.S. at 337, 123 S. Ct. 1471; *id.* at 340, 123 S. Ct. 1471. There are two possible views as to the forms of conduct or practices that the WDCA encompasses that can be considered in assessing whether the WDCA covers "the business of insurance." First, the worker's compensation benefits mandated by the WDCA can be seen as a form of insurance to provide compensation for workplace injuries, thus perhaps creating an insurance-like relationship in which the employer is the "insurer" and the employee is the "insured." This will be referred to as the "benefits-as-insurance" theory. Alternatively, the WCDA contains provisions regulating how an employer can insure itself to provide worker's compensation coverage that could be seen as part of "the business of insurance." This will be referred to as the "insurance-provisions" theory.

In arriving at the conclusion that the WDCA addresses "the business of insurance," the district court

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ance] industry,'" Appellants Br. at 50 (quoting *Med. Mut. of Ohio* v. *deSoto,* 245 F.3d 561, 573 (6th Cir. 2001)), and then relying on this standard to argue that WDCA was not "enacted ... for the purpose of regulating the business of insurance." This standard relates to the ERISA savings clause rather than to McCarran-Ferguson reverse preemption, and, as the Supreme Court has held, these standards are distinct. *See Ky. Ass'n of Health Plans, Inc.,* 538 U.S. at 339-42, 123 S. Ct. 1471.

appeared to rely on the benefits-as-insurance theory. This understanding of the WDCA is precarious at best. As stated above, "[t]he focus of McCarran-Ferguson is upon the relationship between the *insurance company* and *its policyholders*." *Fabe*, 508 U.S. at 501, 113 S. Ct. 2202 (emphasis added). Under the benefits-as-insurance theory, there is no relationship between an insurance company and a policyholder because worker's compensation benefits are not insurance. Although at first blush worker's compensation benefits may seem to act as a form of insurance because they provide compensation for injuries like many forms of insurance, closer scrutiny reveals that this insurance-like impression is solely a matter of appearance.

Insurance is defined as "[a] contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency." BLACK'S LAW DICTIONARY (8th ed. 2004). There is no contract in the worker's compensation scheme. The district court attempts to dismiss the importance of the lack of a contract under the benefits-as-insurance theory by stating that "[t]he WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them." *Brown*, 409 F. Supp. 2d at 810. However, not only does this view fundamentally misconceive the nature of the worker's compensation scheme, it ignores the text of the McCarran-Ferguson Act, which only applies to state statutes that regulate "the *business of* insurance," 15 U.S.C. § 1012(b) (emphasis added), not those governing employers' obligations to their employees for workplace injuries.

The WDCA is a public regulation of the employment relationship that is a substitute for the tort system rather than any contractual relationship between employees and employers. *See generally* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law,* 16 GA. L. REV. 775 (1982). In the context of true contractual accident-insurance relationships, the insurer owes no preexisting duty to the insured to compensate the insured for any injury that the insured may sustain. Rather, as with other contractual relationships, the insured provides consideration in exchange for the insurer's obligation to pay benefits upon the event of an accident. By contrast, in the worker's compensation context, the employer owed the employee a preexisting duty under common-law tort to compensate the employee for workplace injuries due to the fault of the employer. Mandatory worker's compensation schemes, including the WDCA, remove the employee's obligation to prove negligence and causation in exchange for certain benefits in the event of a workplace injury and relinquishing the right to sue (except in cases of intentional torts). However, the employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and worker's compensation merely creates a legislative remedy regarding the tort-liability relationship between employees and their employers, not an insurance contract. There is therefore no insurer and no insured.

Moreover, under the benefits-as-insurance view, the WDCA does not satisfy the *Pireno* factors. 458 U.S. at 129, 102 S. Ct. 3002. The WDCA does not spread the policyholder's risk because, as just explained, there is no contractual insurance relationship and thus no policyholder in the WDCA benefits-

as-insurance approach. Further, the WDCA certainly is not limited to entities within the insurance industry because the WDCA applies to all Michigan employers and employees except those who are specifically exempted. MICH. COMP. LAWS § 418.111. Therefore, under the benefits-as-insurance view, WDCA cannot be seen as addressing "the business of insurance" because the WDCA is a mandatory, public regulation of the tort-liability relationship between employers and employees rather than a regulation of the contractual insurance relationship that underlies "the business of insurance."

Most important, we emphasize that whether the WDCA addresses any practices related to "the business of insurance" is not the same inquiry as whether the WDCA was "*enacted ... for the purpose of regulating* the business of insurance." "To equate laws 'enacted ... for the purpose of regulating the business of insurance' with the 'business of insurance' itself ... would be to read words out of the statute," which the Supreme Court, and we, "refuse to do." *Fabe,* 508 U.S. at 504, 113 S. Ct. 2202; *see also Ky. Ass'n of Health Plans,* 538 U.S. at 340, 123 S. Ct. 1471 (emphasizing that the McCarran-Ferguson Act is concerned with the purpose of the enactment of the state law); *Genord* v. *Blue Cross & Blue Shield of Michigan,* 440 F.3d 802, 806 (6th Cir. 2006). Therefore, the purpose for enacting the state statute must be considered in assessing this element of McCarran-Ferguson reverse preemption. The district court erred in failing to do so.

The purpose of enacting the WDCA "was to require an employer to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault." Edward

Welch, *Worker's Compensation in Michigan: Law and Practice* § 1.2 (4th ed. 2001); *accord Simkins* v. *Gen. Motors Corp.*, 453 Mich. 703, 556 N.W.2d 839, 843-44 (Mich. 1996). In exchange for certainty and ease of recovery for the employee, the employer's liability was limited and defined by making worker's compensation the exclusive remedy except in cases of intentional torts. Welch, at § 1.2; *Simkins,* 556 N.W.2d at 843-44. The Michigan Supreme Court has stated that "[t]he purpose of the [WDCA] as set forth in its title, is to promote the welfare of the people of Michigan relating to the liability of employers for injuries or death sustained by their employees." *Whetro* v. *Awkerman,* 383 Mich. 235, 174 N.W.2d 783, 785 (Mich. 1970). The WDCA's focus on providing certain recovery to employees for workplace injuries while limiting employers' liability rather than the regulation of insurance is underscored by a number of factors. The WDCA was placed in chapter 418 of the Michigan Compiled Laws, which addresses labor matters, rather than in chapter 500, which contains the Michigan Insurance Code. Additionally, the Worker's Compensation Agency rather than the Office of Financial and Insurance Services administers the WDCA. This indicates that the provisions relating to insurance policies within the WDCA were included merely to effectuate the WDCA's primary goal of employee compensation.

Our conclusion that worker's compensation benefits are not insurance and our conclusion that the WDCA was not "*enacted ... for the purpose of regulating* the business of insurance," each independently foreclose the defendants' argument that the WDCA reverse preempts RICO under the McCarran-Ferguson Act. We additionally note that even in the absence of these conclusions that preclude reverse

preemption, the defendants' insurance-provisions theory would not support their reverse-preemption argument. The insurance-provisions theory views the WDCA as regulating "the business of insurance" because there are a number of provisions in the WDCA regarding the insurance an employer may buy to secure payment for worker's compensation benefits. Under the insurance-provisions theory, therefore, the employer is the insured and the company providing the insurance is the insurer. There are several provisions of the WDCA that directly relate to the terms of the insurance contract and thus to "the business of insurance." *See Fabe,* 508 U.S. at 502-03, 113 S. Ct. 2202 (indicating that a statute that "prescrib[es] the terms of the insurance contract" is one that "regulates the 'business of insurance'"). Michigan Compiled Laws § 418.621(2) states that every insurance contract providing worker's compensation-benefits coverage to employers must "insure, cover, and protect in the same insurance policy, all the business, employees, enterprises, and activities of the employer." Section 418.621(4) states that "[e]xcept as modified by the director as provided for herein, each policy of insurance covering worker's compensation in this state shall contain the following provisions," and then lists the specific provisions of the insurance policy, which address "Compensation," "Medical services," "Rehabilitation services," "Funeral expenses," "Scope of contract," "Obligations assumed," "Termination notice," and "Conflicting provisions." Section 418.631(1), which sets forth the consequences for an insurer who fails to pay claims for compensation, also relates to "the business of insurance" because it addresses the performance of the insurance contract. *See Fabe,* 508 U.S. at 503, 113 S. Ct. 2202 ("There can be no doubt that the actual per-

formance of an insurance contract falls within the 'business of insurance.' "); *id.* at 504, 113 S. Ct. 2202 (explaining how the performance of an insurance contract satisfies the *Pireno* test). One point is crucial here: Cassens self insures. Therefore, the practices at issue in this case do not relate to those provisions of the WDCA that address the "business of insurance." Moreover, self-insurance does not relate to the "business of insurance" under the McCarran-Ferguson Act because there is no relationship between an insurer and an insured. *See Fabe,* 508 U.S. at 501, 113 S. Ct. 2202.

Because worker's compensation benefits are not a form of insurance and the insurance-policy provisions are a minor element of the WDCA that was not part of the purpose for enacting the law, the WDCA was *not* "enacted ... for the purpose of regulating the business of insurance," and thus it does not reverse preempt the plaintiffs' RICO claims.

B. RICO Would Not Invalidate, Impair, or Supersede the WDCA

Although our conclusion that the WDCA was not "enacted ... for the purpose of regulating the business of insurance," disposes of the defendants' reverse-preemption argument, we note that RICO is also saved from reverse preemption by the WDCA under the McCarran-Ferguson Act because RICO would not "invalidate, impair, or supersede" the WDCA. RICO would not invalidate or supersede the WDCA because RICO would not "render [the WDCA] ineffective" given that those subject to these laws can comply with both simultaneously. *See Humana,* 525 U.S. at 307, 119 S. Ct. 710 ("The term 'invalidate' ordinarily means 'to render ineffective, generally without providing a replacement rule or law[,]' [a]nd the term

'supersede' ordinarily means 'to displace (and thus render ineffective) while providing a substitute rule.'"). The question remains whether RICO would "impair" the WDCA. In construing the term "impair," the Supreme Court explained that "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarranFerguson Act does not preclude its application." *Id.* at 310, 119 S. Ct. 710.

The WDCA bars and imposes sanctions on the denial of benefits to which employees are legally entitled. MICH. COMP. LAWS §§ 418.631, 418.801. A RICO claim here would also act to punish the improper denial of benefits if done as part of a pattern of racketeering activity. "To the extent that the [state] law prohibited practices also prohibited under federal law," the federal law does not "frustrate a goal of [the state] law." *Humana,* 525 U.S. at 310-11, 119 S. Ct. 710 (internal quotation marks omitted). Moreover, the federal interest in protecting individuals against a pattern of racketeering activity based on fraud is "'perfectly compatible'" with the state interest in providing a certain remedy for employees who have suffered workplace injuries. *Id.* at 311, 119 S. Ct. 710. The only aspect of RICO that would arguably impair the WDCA is the difference in the remedies provided for under RICO and the WDCA. RICO allows for treble damages and attorney fees, 18 U.S.C. § 1964(c), whereas the WDCA provides that

> [i]f weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50.00

> per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

MICH. COMP. LAWS § 418.801(2). In *Humana,* the Supreme Court considered whether "a federal law, which proscribes the same conduct as state law, but provides materially different remedies, 'impair[s]' state law under the McCarran-Ferguson Act?" 525 U.S. at 305, 119 S. Ct. 710. The Court answered this question in the negative. *Id.* at 311, 119 S. Ct. 710.

The Court's conclusion in *Humana* applies equally here. First, *Humana* treats the impairment consideration as an "as-applied" challenge that looks to whether the federal statute would impair the state statute in a particular application. In *Humana,* the availability of punitive damages under state law greater than the treble damages available under RICO supported the conclusion that RICO did not impair the state law. 525 U.S. at 312, 119 S. Ct. 710. The Court held this even though the state law would not allow for the imposition of punitive damages "when doing so would threaten the solvency of the defendant" because "the record contains no evidence of insolvency here." *Id.* at 313 n.12, 119 S. Ct. 710. Here, because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance. Therefore, a RICO suit in this case would not impair the WDCA's regulation of "the business of insurance."

Second, unlike the state law at issue in *Humana,* which was also directed at insurance fraud, the WDCA provision regarding sanctions for failure to pay benefits does not appear to contemplate the

fraudulent denial of worker's compensation benefits. Therefore, a RICO suit would not contravene any "*declared* state policy or interfere with [the state's] administrative regime," which does not address the fraudulent denials of benefits. *Humana,* 525 U.S. at 310, 119 S. Ct. 710 (emphasis added). The district court's assertion that a RICO suit would impair the WDCA's policy of limited liability for employers relies on the faulty premise that the state has a policy of limited liability for employers even when they *fraudulently* deny worker's compensation benefits. No authority supports this position. As in *Humana,* the fact that the state "filed no brief at any stage of this lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative regime" further supports the conclusion that there is no impairment here. *Id.* at 314, 119 S. Ct. 710. We therefore hold that the WDCA does not reverse preempt RICO because the WDCA was not "enacted ... for the purpose of regulating the business of insurance" and because RICO would not "invalidate, impair, or supersede" the WDCA.

VI. INTENTIONAL INFLICTION OF EMOTION DISTRESS

After dismissing the plaintiffs' RICO claims, the district court proceeded to address their state-law IIED claims, even though a federal court should typically decline to exercise pendent jurisdiction over a plaintiff's state-law claims after dismissing the plaintiff's federal claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers of Am.* v. *Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The district court addressed these claims because it mistakenly believed that "the resolution of Plaintiffs' IIED

claims is necessary to the Court's determination of whether the WDCA reverse-preempts Plaintiffs' RICO claims under the McCarran-Ferguson Act." *Brown*, 409 F. Supp. 2d at 813. As is clear from our analysis above, the resolution of plaintiffs' IIED claims has no bearing on the reverse-preemption issue, which turns on the purpose of the WDCA and on RICO's effect on the WDCA. Because in this case the "'interests of judicial economy and the avoidance of multiplicity of litigation'" did not trump the interest in "'needlessly deciding state law issues,'" the district court abused its discretion in exercising pendent jurisdiction to decide the plaintiffs' state-law claims. *Moon* v. *Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006) (quoting *Landefeld* v. *Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993)). Despite the district court's error in addressing the plaintiffs' IIED claims, because we are reversing the dismissal of plaintiffs' federal RICO claims, we will proceed to review the district court's decision dismissing the IIED claims.

In construing questions of state law, a federal court must apply state law in accordance with the controlling decisions of the highest court of the state. *Meridian Mut. Ins. Co.* v. *Kellman*, 197 F.3d 1178, 1181 (6th Cir. 1999). "The Michigan Supreme Court has never formally recognized IIED as a cause of action." *Moon*, 465 F.3d at 728 (citing *Roberts* v. *Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905, 913 (Mich. 1985)); *see also Smith* v. *Calvary Christian Church*, 462 Mich. 679, 614 N.W.2d 590, 595 (Mich. 2000) (Weaver, C.J., concurring). Assuming such a claim does exist, a plaintiff must show the following elements to establish an IIED claim: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress."

Roberts, 374 N.W.2d at 908 (internal quotation marks omitted). The Michigan Supreme Court has described "extreme and outrageous conduct" as follows:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 908-09 (internal quotation marks omitted).

In applying this standard, the Michigan Supreme Court held that a no-fault insurer's "failure ... to facilitate the filing of a replacement services claim, a delay of at most six months in responding to the claim as filed, and the denial of benefits owed" was insufficient to meet the standard for outrageous conduct. *Id.* at 911. In arriving at this conclusion, the court noted that "[t]here is no indication that [the insurer] set out to harass these plaintiffs, nor does the evidence disclose a course of conduct that may fairly be characterized as so outrageous in character ... as to go beyond all possible bounds of decency...." *Id.* (internal quotation marks omitted).

We affirm the district court's dismissal of the plaintiffs' IIED claims because, like the defendant's conduct in *Roberts,* the plaintiffs' allegations of defendants' fraudulent denial of worker's compensation benefits are not "so outrageous in character ... as to go beyond all possible bounds of decency." *Id.* Decisions of the Michigan Court of Appeals confirm this conclusion. That court has explained that the "wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." *Atkinson* v. *Farley,* 171 Mich. App. 784, 431 N.W.2d 95, 97 (Mich. Ct. App. 1988). Even the wrongful denial of worker's compensation benefits "to further some ulterior motive of the defendants," as the plaintiffs here allege, is insufficiently outrageous to support an IIED claim under Michigan law. *Lisecki* v. *Taco Bell Rests., Inc.,* 150 Mich. App. 749, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986); *accord Hajciar* v. *Crawford & Co.,* 142 Mich. App. 632, 369 N.W.2d 860, 864 (Mich. Ct. App. 1985).[7] For these reasons, dismissal of the plaintiffs' IIED claims was proper.

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[7] In the district court, Cassens argued that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, preempted plaintiffs' IIED claims. The district court did not address this argument because it dismissed the IIED claims under Rule 12(b)(6). The district court likely should have addressed the preemption question first because in cases of LMRA preemption, the court must "recharacterize" the state cause of action as a federal claim and analyze the claim under federal law. 14B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1 (3d ed. 1998). However, the defendants do not raise LMRA preemption on appeal, and thus we simply review the district court's decision to dismiss for failure to state a claim.

VII. CONCLUSION

We REVERSE the dismissal of plaintiffs' RICO claims because their RICO claims are not preempted by state law and because plaintiffs have adequately pleaded a pattern of racketeering activity despite the lack of reliance on the defendants' fraudulent acts and REMAND to the district court for further proceedings consistent with this opinion. We AFFIRM the dismissal of the IIED claims because the defendants' alleged conduct cannot meet Michigan's standard for outrageous conduct.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

United States District Court for the Eastern District of Michigan

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Plaintiffs,

v.

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, FOREIGN CORPORATIONS, AND DR. SAUL MARGULES,

Defendants.

No. 04-CV-72316

July 15, 2005

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULE 12(B)(6)

BORMAN, District Judge.

Now before the Court are Defendants' motions to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). The Court heard oral argument on March 10, 2005. Having considered the entire record, and for the reasons that follow, the Court:

1) DISMISSES Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18

U.S.C. § 1961, *et seq.*, because they fail to state claims for which relief may be granted, and because Michigan's Workers' Disability Compensation Act, M.C.L. 418.101, *et seq.*, reverse-preempts those claims under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b); and

2) DISMISSES Plaintiffs' state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

I. PROCEDURAL BACKGROUND

At all times relevant to the instant action, Paul Brown ("Brown"), William Fanaly ("Fanaly"), Charles Thomas ("Thomas"), Gary Riggs ("Riggs"), Robert Orlikowski ("Orlikowski"), and Scott Way ("Way") (collectively "Plaintiffs") were employees of Cassens Transport Company ("Cassens"). (Compl. at ¶ 4.) Crawford & Company ("Crawford") adjusted workers-compensation claims of Cassens' employees on Cassens' behalf. (*Id.*) Dr. Saul Margules ("Margules") examined certain Plaintiffs concerning their entitlements to workers' compensation benefits. (*Id.* at ¶ 6B.)

On June 22, 2004, Plaintiffs filed suit against Cassens, Crawford, and Margules (collectively "Defendants"), alleging that each Defendant engaged in a fraudulent enterprise to deny each Plaintiff of his workers' compensation benefits in violation of the Racketeer Influenced and Corrupt Organizations Act ("the RICO Act"), 18 U.S.C. § 1961, *et seq.*, and alleging that Defendants subjected each Plaintiff to the intentional infliction of emotional distress in violation of Michigan law. (*Id.* at ¶¶ 1-77.) Plaintiffs' complaint, in essence, alleges that Defendants conspired

to deny each Plaintiff's workers' compensation claim even though they were aware of facts that would support the validity of each of those claims.

On August 23, 2004, Crawford filed the instant motion to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). In that motion, Crawford argues that: 1) the McCarran-Ferguson Act, 15 U.S.C. § 1012, *et seq.*, preempts Plaintiffs' RICO claims; and 2) Plaintiffs' intentional-infliction-of-emotional-distress ("IIED") claims fail as a matter of law because Michigan does not recognize causes of action for the mere tortious refusal to pay workers' compensation benefits. (Crawford Mot. at 2.) Cassens and Margules concur in this motion to the extent that its arguments would equally apply to Plaintiffs' claims against them.

On September 7, 2004, Cassens filed the instant motion to dismiss Plaintiffs' complaint under Rule 12(b)(6). Along with raising the same two claims that Crawford raises in its motion to dismiss, Cassens' motion contends that: 1) the primary-jurisdiction doctrine bars Plaintiffs' complaint; 2) the Labor Management Relations Act of 1947 ("LMRA") or § 301(a), 29 U.S.C. § 141, *et seq.*, preempts Plaintiffs' RICO claims; and 3) Plaintiffs' RICO claims fail to state claims for which relief may be granted. (Cassens Mot. at 2-3.) Crawford and Margules concur in this motion to the extent that its arguments would equally apply to Plaintiffs' claims against them.

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise as a defense to a claim for relief in a pleading the opposing party's failure to state a claim upon which relief can be granted. Rule 12(b)(6) is de-

signed to test whether, as a matter of law, a plaintiff is entitled to legal relief. *Nishiyama* v. *Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987). Before dismissing a complaint for failure to state a claim upon which relief can be granted, a court must conclude "beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Carver* v. *Bunch*, 946 F.2d 451, 452 (6th Cir. 1991).

To survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid* v. *Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and accept well-pleaded facts as true. *Columbia Natural Resources Inc.* v. *Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Thus, a court may not grant a Rule 12(b)(6) motion based upon its disbelief of a complaint's factual allegations. *Id.* A court, however, need not accept as true conclusions of law or unwarranted factual inferences. *Morgan* v. *Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

Federal Rule of Civil Procedure 9(b) provides that, "[i]n all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity." *See generally Begala* v. *PNC Bank, Ohio, Nat. Ass'n*, 214 F.3d 776 (6th Cir. 2000) (holding that pleadings under the RICO Act are to be liberally construed).

Federal Rule of Civil Procedure 12(b) provides:

> If, on a motion asserting the defense ... [of] failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A. RICO CLAIMS

The Court will proceed to discuss the following issues related to Plaintiffs' RICO claims:

1) whether the primary-jurisdiction doctrine mandates a stay of Plaintiffs' RICO claims;

2) whether the *Burford* doctrine mandates a stay of Plaintiffs' RICO claims;

3) whether the complaint pleads predicate acts of witness tampering;

4) whether the complaint pleads predicate acts of mail or wire fraud with the necessary particularity;

5) whether the complaint pleads the requisite detrimental reliance;

6) whether the McCarran-Ferguson Act reverse-preempts Plaintiffs' RICO claims; and

7) whether the Labor Management Relations Act preempts Plaintiffs' RICO claims.

1. Primary-Jurisdiction Doctrine

In its motion to dismiss, Cassens contends that the doctrine of primary jurisdiction applies to Plaintiffs' RICO claims. (Cassens Br. at 20.) According to Cassens, all of the Plaintiffs except Fanaly have

claims for workers' compensation benefits that are pending before the Workers Disability Compensation Bureau ("the WDCB"). (Reply at 5.)

The primary-jurisdiction doctrine's aim is to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 63, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956). Specifying when the doctrine of primary jurisdiction is applicable, the Supreme Court has held:

> .... "Primary jurisdiction" applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of a claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case[,] a judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64, 77 S. Ct. 161. Thus, the primary-jurisdiction doctrine applies where: 1) the Court has original jurisdiction over the claim before it; 2) the adjudication of that claim requires the resolution of certain underlying issues; and 3) a regulatory scheme commits the resolution of those issues to an administrative agency's special competence. In deciding whether the primary-jurisdiction doctrine applies in any given case, the court must determine whether the application of that doctrine in the particular case would serve the following twin rationales underlying that doctrine: 1) uniformity in questions of an administrative nature; and 2) the expert and specialized knowledge of the relevant agency to the issue in question. *Id.* at 64, 77 S. Ct. 161.

The threshold requirements for the applicability of the primary-jurisdiction doctrine are met here. First, the Court clearly has jurisdiction over Plaintiffs' RICO claims as they arise under federal law. Second, the adjudication of Plaintiffs' RICO claims-i.e. that Defendants engaged in a RICO enterprise fraudulently to deny Plaintiffs' workers' compensation benefits-hinges, in part, upon whether Plaintiffs are entitled to those benefits in the first instance. (Cassens Br at 20; Resp. Cassens at 17.) Lastly, a regulatory scheme of the Michigan legislature, the Workers' Disability Compensation Act ("the WDCA"), commits the resolution of an employee's entitlement to workers' compensation benefits to the special competence of the WDCB. (Cassens Br. at 20.) Specifically, the WDCA, M.C.L. 418.841(1), provides:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable.

The primary-jurisdiction doctrine's twin rationales are also met here. Given the complicated medical issues underlying Plaintiffs' entitlement to workers' compensation benefits, the WDCB, rather than the Court, possesses the necessary expertise and the specialized knowledge properly to resolve those underlying issues and, thus, the ultimate issues of Plaintiffs' entitlement to benefits. Deferring to the WDCB's determination of a plaintiff's entitlement to workers' compensation benefits in cases such as this would promote uniformity in such determinations. Thus, a consideration of the relevant factors counsels in favor of applying the primary-jurisdiction doctrine

to stay the adjudication of Plaintiffs' RICO claims, if they survive the instant motion.[1]

On the other hand, it is unclear whether the primary-jurisdiction doctrine may apply in favor of a state administrative agency where the claim at issue arises under federal law and there are no competing federal forums. 73 C.J.S. Public Administrative Law and Procedure § 72. The majority of courts that have applied the primary-jurisdiction doctrine have done so in favor of a federal administrative agency.[2] *See*

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[1] While Cassens contends that the application of the primary-jurisdiction doctrine to Plaintiffs' RICO claims would require the dismissal of those claims, such a contention is incorrect. (Cassens Br. at 20-21.) The principal issue underlying the application of that doctrine is simply whether a federal court should postpone the exercise of its jurisdiction in deference to an administrative agency; it does not divest the Court of its subject-matter jurisdiction. *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 353, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963).

[2] At least one federal court sitting in diversity jurisdiction has applied the primary-jurisdiction doctrine in favor of a state administrative agency. *See Northwinds Abatement, Inc.* v. *Employers Ins. of Wausau,* 69 F.3d 1304, 1311 (5th Cir. 1995) (holding that, under the doctrine, the district court should have stayed the diversity-jurisdiction case pending the state workers' compensation commission's final decision on whether the defendant properly paid certain workers' compensation claims). It is unclear, however, whether that federal court deferred to the state administrative agency's primary jurisdiction only on the ground that the *Erie* doctrine would compel such deferral. *See* 73 C.J.S. Public Administrative Law and Procedure § 72; *Virginia Imports, Inc.* v. *Kirin Brewery of Am., LLC,* 296 F. Supp. 2d 691, 698, 698 n.1 (E.D. Va. 2003) (holding that, in a diversity-jurisdiction case involving only state claims, the primary-jurisdiction doctrine does not apply in favor of a state agency, as compared to a federal agency, and holding that, even if the doctrine were to apply, a federal district court sitting in diver-

Far East Conference v. *United States,* 342 U.S. 570, 574-75, 72 S. Ct. 492, 96 L. Ed. 576 (1952) (applying the doctrine in favor of the Federal Maritime Board in the context of federal claims); *Western Pac. R.R. Co.*, 352 U.S. at 63-64, 77 S. Ct. 161 (applying the doctrine in favor of the Interstate Commerce Commission in the context of federal claims); *In re Long Distance Telecommunications Litigation,* 831 F.2d 627, 631-32, 634 (6th Cir. 1987) (applying the doctrine in favor of the Federal Communications Commission in the context of federal claims).

In *County of Suffolk* v. *Long Island Lighting Co.*, the United States Second Circuit Court of Appeals held that, subject to a narrow exception, the primary-jurisdiction doctrine does not apply in favor of a state administrative agency where there is a federal claim at issue and where there are no competing federal forums. 907 F.2d 1295, 1310 (2d Cir. 1990) (holding that the exception applies where a state administrative agency operates pursuant to a federal legislative scheme). The Second Circuit chiefly reasoned that the "theoretical underpinning of the primary-jurisdiction doctrine ... is the authority [that] *Congress* intended th[e] [administrative] agency to exercise within a particular statutory scheme." *Id.* (emphasis in original); *see Far East Conference,* 342 U.S. at 574-75, 72 S. Ct. 492 (addressing the doctrine in terms of a regulatory scheme that Congress created, and noting that courts and administrative agencies are "means adopted to attain the prescribed end ... through co-ordinated action"). The Second Circuit elaborated that, "[i]n the federal question/federal agency context, the creation of an agency and the

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sity would defer to a state agency's primary jurisdiction only if state courts would so defer).

grant to it of certain adjudicative authority may evince a congressional intent to limit the judiciary's jurisdiction." *County of Suffolk*, 907 F.2d at 1310. As the Court pointed out, "the independent act of a state legislature in creating a particular administrative body ... can shed no light on *Congress'* intent to limit the jurisdiction of the federal courts[.]" *Id.* at 1311. While finding that the agency-expertise rationale underlying the primary-jurisdiction doctrine was implicated in the case, the Court underscored that it is that doctrine's theoretical underpinnings that controls its applicability, "not the functional competence of an agency[.]" *Id.* at 1310.

However, in the subsequent case of *Johnson* v. *Nyack Hospital*, the Second Circuit held that, under the primary-jurisdiction doctrine, the district court should have stayed the plaintiff's federal antitrust claim pending a state administrative agency's determination of the complicated factual issues underlying that claim. 964 F.2d 116, 122-23 (2d Cir. 1992) (noting that, under the distinct doctrine of exhaustion, the issue is whether Congress' statutory intent was to render a federal claim cognizable only in the first instance by an administrative agency, whether state or federal). While recognizing that most cases applying the primary-jurisdiction doctrine did so in favor of a federal administrative agency, the Court reasoned that the application of that doctrine there served the underlying agency-expertise rationale as well as judicial economy. *Id.* The Court neither mentioned nor distinguished *County of Suffolk*. Thus, it is unclear what remains, if anything, of the precedential value of *County of Suffolk*.

As discussed below, the *Burford* doctrine would compel the stay of Plaintiffs' RICO claims pending

the WDCB's determination of Plaintiffs' entitlements to workers' compensation benefits.

2. *Burford* Abstention Doctrine

The *Burford* abstention doctrine takes its name from the Supreme Court's decision in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). In *Rouse* v. *DaimlerChrysler Corporation,* the United States Court of Appeals for the Sixth Circuit underscored that the aim of the *Burford* doctrine is to "avoid conflict with a state's administration of its own affairs." 300 F.3d 711, 716 (6th Cir. 2002). The Sixth Circuit held that, therefore, the *Burford* doctrine "applies only if a federal court's decision on a state law issue is likely to 'interfere with the proceedings or orders of state administrative agencies.' " *Id.* The Sixth Circuit further held:

> The *Burford* abstention [doctrine] should not be applied unless: (1) a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or (2) the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Id. (internal quotation marks omitted); *see Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 727, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996) (implicitly recognizing that the *Burford* doctrine may apply where the case involves either a "state-law claim" or "an assertion that the federal claims [were] ... entangled in a skein of state law that must be entangled before the federal case can proceed") (internal quotation marks

omitted). Since *Burford*, the Supreme Court has held that a federal court may dismiss or remand a complaint "based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush*, 517 U.S. at 731, 116 S. Ct. 1712 (illustrating such equitable or discretionary relief with suits for injunctive relief or certain classes of declaratory judgments). However, the Court noted that, in actions "at law" or for damages, it has only permitted federal courts, based on abstention principles, to "enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether." *Id.* at 719, 116 S. Ct. 1712.

Cassens contends that the Court should apply the *Burford* doctrine to Plaintiffs' RICO claims so that the WDCB may determine Plaintiffs' entitlement to workers' compensation benefits in the first instance.[3] (Cassens Reply at 5.) Plaintiffs, in response, maintain that Cassens has failed to present any meaningful argumentation on the applicability of the *Burford* doctrine to Plaintiffs' RICO claim. (Resp. at 19.) Yet, since the *Burford* doctrine implicates important issues of comity.

Contrary to Plaintiffs' contention, the determination of their entitlement to workers' compensation benefits in this federal forum would likely frustrate or undermine Michigan's workers' compensation scheme, as set forth in the WDCA. (*See* Resp. Cas-

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[3] While Cassens contends that the application of the *Burford* doctrine to Plaintiffs' RICO claims requires the Court to dismiss those claims, *Quackenbush* forecloses any such contention. (Reply at 5.) Rather, at issue is whether the Court should stay Plaintiffs' RICO claims pending the WDCB's determination of Plaintiffs' entitlement to workers' compensation benefits.

sens at 19.) That administrative scheme is comprehensive, setting forth the nature and amount of the particular benefits to which it affords entitlement, the scope of any such entitlement, and the administrative and judicial processes for resolving any disputes regarding that entitlement. The determinations of Plaintiffs' entitlement to workers' compensation benefits often hinge upon complex medical issues. Given the expertise and specialized knowledge necessary to resolve such underlying issues properly, the determination of Plaintiffs' entitlement to workers' compensation benefits in this federal forum may result in adjudications that would be contrary to those of the WDCB. Indeed, the frequent resolution, in a federal forum, of a plaintiff's entitlement to workers' compensation benefits in cases such as this would likely undermine the uniformity and coherence in such determinations that Michigan seeks to achieve via its establishment of the WDCB.

Contrary to Plaintiffs' assertion, an employee's entitlement to workers' compensation benefits bears upon "policy problems of a substantial public import" or "matter[s] of substantial public concern." *See Rouse*, 300 F.3d at 716. (*See* Resp. to Cassens at 19.) As the Michigan Supreme Court has declared:

> The primary purpose of the ... [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers. An employee who suffers an injury arising out of and in the course of his employment will be eligible for compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability be-

> cause the ... [WDCA], under M.C.L. § 418.131(1)..., provides that this compensation is the exclusive remedy for a personal injury, except for an injury resulting from intentional tort. Thus, ... [the WDCA's] purpose is to provide ... not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

Simkins v. *General Motors Corp.*, 453 Mich. 703, 710, 556 N.W.2d 839 (Mich. 1996). Thus, an employee's entitlement to workers' compensation benefits bears upon Michigan's significant interest in safeguarding the policy balance that the legislature struck in the WDCA by ensuring employees' speedy and no-fault recovery of guaranteed compensation for work-related injuries and by shielding employers, in exchange for providing their employees with such compensation, from liability beyond that which the WDCA permits. Moreover, both Michigan's employers and their employees have substantial interests in gaining their respective benefits from that regulatory balance. In determining an employee's entitlement to workers' compensation, a federal forum may not be as adept at navigating that policy balance as the WDCB, to which the Michigan Legislature entrusted that task in the first instance. Furthermore, the improper denial of an employee's entitlement to workers' compensation benefits for a work-related disability would be of great public important were that employee, consequently, to become a ward of the state.

Comparatively-speaking, in contrast to its substantial interest in resolving the federal-law issues of Plaintiffs' RICO claims, this federal forum would have a minimal interest in determining Plaintiffs'

entitlement to workers' compensation benefits. The Court would, therefore, stay Plaintiffs' RICO claims based on their alleged entitlement to workers' compensation benefits, if they survived the instant motions, pending a final determination of Plaintiffs' entitlement to those benefits via Michigan's workers' compensation scheme.

3. RICO Claims

The RICO Act, 18 U.S.C. § 1961, *et seq.*, affords a civil remedy when an individual is "injured in his business or property" by virtue of a violation of § 1962 of the Act. *See* 18 U.S.C. § 1964(c) (providing that the person may "recover threefold the damages [that] he sustains and the cost of the suit, including a reasonable attorney's fee"). Section 1962(c) of the RICO Act provides, in part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...

18 U.S.C. § 1962(c).

The RICO claims that Plaintiffs' complaint sets forth solely arise under § 1962(c). In the instant motions to dismiss, Defendants contend that Plaintiffs' complaint, however, fails to plead claims under § 1962(c) for which relief may be granted.

The elements of a viable cause of action under 18 U.S.C. § 1962(c) are: 1) the conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Central Distributors of Beer, Inc.* v. *Conn*, 5 F.3d 181 (6th Cir. 1993) (quoting *Sedima* v. *Imrex*, 473 U.S.

479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)). Section 1961(1)(B) of the RICO Act defines the requisite "racketeering activity" to include, as a predicate act, "any act which is indictable under any of the following provisions of title 18, United States Code...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), ... [and] section 1512 (relating to tampering with a witness, victim, or an informant)[.]" 18 U.S.C. § 1961(1)(B). Section 1961(5) of the RICO Act mandates that the requisite "pattern of racketeering activity" include at least two acts of such activity, which must have occurred within a ten-year period. 18 U.S.C. § 1961(5).

a. Witness Tampering

Cassens, for the first time in reply, asserts that Plaintiffs' complaint fails sufficiently to plead a predicate act of witness tampering under 18 U.S.C. § 1512. (Reply at 4.) Plaintiffs' complaint, per paragraphs 12, 16A, 32, and 34A, alleges that each Defendant twice violated § 1512 when, on two occasions, the corporate Defendants "expressly or implied[ly] communicated to" Margules that they wanted him to write false cut-off reports for Plaintiffs Fanaly and Brown regardless of their actual entitlement to workers' compensation benefits and when Margules opined to the other Defendants that Plaintiffs had no job-related disabilities. (Compl. at ¶¶ 12, 16A, 32, 34A.)

These allegations, however, are insufficient to survive a motion to dismiss. Plaintiffs' complaint fails to explain how Defendants' actions violated § 1512. Indeed, Plaintiffs acknowledged the tenuous and specious nature of such predicate acts at oral argument. Accordingly, the Court dismisses Plaintiffs'

RICO claims to the extent that they rely upon predicate acts under 18 U.S.C. § 1512.

b. Mail and/or Wire Fraud

A plaintiff must prove each element of the predicate act or "racketeering activity" for a civil action under the RICO Act to lie. *Central Distributors of Beer, Inc.* v. *Conn,* 5 F.3d 181, 183-84 (6th Cir. 1993). "To allege a violation of the mail fraud statute, it is necessary to show that: 1) the defendants formed a scheme or artifice to defraud; 2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and 3) the defendants did so with the specific intent to deceive or to defraud." *Id.* at 184 (citing *Schreiber Distributing* v. *Serv-Well Furniture,* 806 F.2d 1393, 1399 (9th Cir. 1988)). Similarly, to allege a violation of the wire fraud statute, it is necessary to show: 1) "the formation of a scheme or artifice to defraud; 2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and 3) [the] specific intent to deceive or to defraud." *Id.* (citing *Schreiber,* 806 F.2d at 1400).

Federal Rule of Civil Procedure 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Where a plaintiff relies upon mail or wire fraud to constitute a predicate act under RICO, Rule 9(b) requires that he must allege, at a minimum, the time, place, and contents of the fraudulent communications. *Bender* v. *Southland Corp.,* 749 F.2d 1205, 1216 (6th Cir. 1984).

(1) Requisite Particularity

In its motion to dismiss, Cassens contends that Plaintiffs' complaint fails, as a matter of law, to plead the predicate acts of wire or mail fraud underlying their RICO claims with the particularity that Rule 9(b) requires. (Cassens Br. at 16.) In particular, Cassens asserts that Plaintiffs' complaint fails to plead with particularity the time, place, or content of the communications underlying the alleged predicate acts of mail or wire fraud. (Cassens Br. at 17.) Plaintiffs, in response, assert that their complaint pleads the mail and wire communications with the necessary particularity. (Resp. Cassens at 10).

As to Plaintiff Fanaly's RICO claims, the complaint pleads with the requisite particularity two predicate acts of mail fraud, per paragraphs 9 and 14, and one predicate act of wire fraud, per paragraph 8. Paragraphs 12 and 16A plead additional claims of mail and wire fraud in that they allege, respectively, that "Defendants expressly or implied[ly] communicated to" Margules that they wanted him to write false cut-off reports regardless of the true circumstances, and that "Margules opined to the other [D]efendants that [P]laintiff had no job-related disability." (Compl. at ¶¶ 12, 16A.) Paragraphs 12 and 16A further plead that these communications were "by mail and wire and are not in the possession of [P]laintiff but are in the possession of [D]efendants," and that these allegations are "based in part upon information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." (*Id.*) Paragraphs 12 and 16A fail to plead the time and place of such communications.

Plaintiffs contend that, where, as here, their complaint expressly invokes Federal Rule of Civil Procedure 11(b)(3), which allows pleading based on "evidence reasonably anticipated after further investigation or discovery," the Court should relax the particularity-requirement of Rule 9(b). (Resp. Cassens at 11.) In *Rotella v. Wood*, the Supreme Court affirmed that Rule 11(b)(3) provides some "flexibility" concerning Rule 9(b)'s particularity requirement. 528 U.S. 549, 560, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) (citing *Corley* v. *Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-51 (7th Cir. 1998), in which the court relaxed Rule 9(b)'s particularity requirements where the RICO plaintiff lacked access to all facts necessary to detail his claim). On the other hand, while Rule 11(b)(3) may relax Rule 9(b)'s particularity requirement, it cannot be construed to eviscerate that requirement in its entirety by permitting rank speculation. The Court strikes from the complaint the predicate acts alleged in paragraphs 12 and 16A. However, Fanaly's RICO claims, per paragraphs 8, 9, and 14, plead with the requisite particularity at least two predicate acts of mail and/or wire fraud.[4]

As to Plaintiff Thomas' RICO claims, the complaint pleads with the necessary particularity only one predicate act, mail fraud per paragraph 23. However, paragraph 24 fails properly to plead another predicate act. Rather, paragraph 24 simply alleges that "Defendants also committed mail fraud in that their pleadings in the workers' compensation

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[4] Nevertheless, Fanaly's RICO claims based upon the predicate acts in paragraphs 8, 9, and 14—along with the predicate act in paragraph 12—fail to state claims for which relief may be granted, as discussed below.

case fraudulently denied that [P]laintiff suffered a work-related injury when they had knowledge that [P]laintiff had suffered" such an injury. (Compl. at ¶ 24.) Paragraph 24, which neither invokes Rule 11(b)(3) nor would have any reason to do so, fails to allege with the necessary particularity the time or the place of that communication. Because Thomas' RICO claims only sufficiently plead one predicate act, they fail, as a matter of law, to allege the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted.[5] *See* 18 U.S.C. § 1961(5).

As to Plaintiff Brown's RICO claims, the complaint pleads with the necessary particularity three predicate acts of mail fraud, per paragraphs 35 and 41A, and three predicate acts of wire fraud, per paragraphs 41 and 41A. Paragraphs 32 and 34 allege, respectively, that Defendants "expressly or implied[ly] communicated" to Margules via mail and wire that they wanted him to write false cut-off reports, and that Margules opined to Defendants via mail and wire that Brown had no job-related disability; both paragraphs expressly invoke Rule 11(b)(3). For the same reasons stated above, the Court finds that paragraphs 32 and 34 do not plead predicate acts of mail and wire fraud with the requisite particularity to survive the instant motions to dismiss. However, Brown's RICO claims, per paragraphs 35,

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[5] Moreover, even if paragraph 24 alleges a predicate act of mail fraud with the necessary particularity, Thomas' RICO claims would still fail to state claims for which relief may be granted based upon the predicate act in paragraph 23, as addressed below.

41, and 41A, plead with the requisite particularity at least two predicate acts of mail and/or wire fraud.[6]

As to Plaintiff Riggs' RICO claims, the complaint pleads only one predicate act—mail fraud per paragraph 48—although it does so with the requisite particularity.[7] Because Riggs' RICO claims fail to plead at least two predicate acts, they fail, as a matter of law, to allege the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted.[8] *See* 18 U.S.C. § 1961(5).

As to Plaintiff Orlikowski's RICO claims, the complaint pleads a predicate act of mail fraud, per paragraph 58, with the requisite particularity. Paragraph 57 pleads another predicate act of mail and/or wire fraud based upon Margules' transmission of his allegedly-fraudulent medical report to Defendants. While paragraph 57, which does not invoke Rule 11(b)(3), pleads the time and content of the communication, it fails to specify the means of the communication. Even if paragraph 57 were to plead a predicate act of mail or wire fraud with the requisite particularity, Orlikowski's RICO claims based upon such a predicate act—along with the predicate act in

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[6] In any event, as discussed below, Brown's RICO claims based upon the predicate acts in paragraphs 35, 41, and 41A—along with those in paragraphs 32 and 34—fail to state claims for which relief may be granted.

[7] Moreover, as discussed below, Riggs' RICO claims based upon the predicate act in paragraph 48 would fail to state claims for which relief may be granted for another reason.

[8] Moreover, Riggs' RICO claims based upon the predicate act of mail fraud in paragraph 48 fail to state claims for which relief may be granted for another reason, as addressed below.

paragraph 58—would, nevertheless, fail as a matter of law, as discussed below.

Lastly, as to Plaintiff Way's RICO claims, the complaint pleads with the necessary particularity at least two predicate acts of mail fraud, per paragraphs 68 and 69.[9]

The Court, therefore, dismisses the RICO claims of Plaintiffs Thomas and Riggs for failure to plead the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted. *See* 18 U.S.C. § 1961(5).

c. Detrimental Reliance

In its motion to dismiss, Cassens contends that Plaintiffs must either plead detrimental reliance as an element of each predicate act of mail or wire fraud underlying their RICO claims or as part of the causation element of those claims, and that Plaintiffs' complaint has failed to do so. (Cassens Br. at 17, 19; Reply at 4.) Plaintiffs, in response, assert otherwise. (Resp. at 15)

In *Blount Financial Services, Inc.* v. *Walter E. Heller & Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit held that a civil RICO complaint involving a predicate act of mail fraud must allege "with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact" to establish the "scheme to defraud" element of mail fraud. *Accord Bender*, 749

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[9] However, Way's RICO claims based upon the predicate acts in paragraphs 68 and 69 fail to state claims for which relief may be granted, as discussed below.

F.2d at 1216; *Central Distributors*, 5 F.3d at 184. The Sixth Circuit continues to espouse this holding.[10]

While a plaintiff need not plead detrimental reliance as an element of each predicate act of mail or wire fraud underlying his RICO claims, the Sixth Circuit, in *Chaz Construction, L.L.C.* v. *Codell*, recently opined that "*Central Distributors* [v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993),] held that a showing of reliance is required to establish standing in civil RICO cases" and that this "holding ... is not in conflict with the Supreme Court's decision in *Neder* [v. *United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999),] or th[e] ... [Sixth Circuit's] decision in [*United States* v.] *Daniel*, [329 F.3d 480 (6th Cir. 2003)]." 137 Fed. Appx. 735 (6th Cir. 2005) (unpublished opinion). In *Chaz Construction*, the Sixth Circuit recognized that, per *Neder*, the common-law requirement of justifiable reliance has no place in the federal fraud statutes-to wit, that reliance is not an

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[10] *See VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (holding, in a civil RICO case based upon predicate acts of mail and wire fraud, that the plaintiff must plead "a material misrepresentation of fact that was calculated or intended to deceive persons of reasonable prudence and comprehension," and that the plaintiff "relied upon that material misrepresentation" to establish the fraud statutes' requisite "scheme to defraud"); *Armbruster* v. *K-H Corporation*, 206 F. Supp. 2d 870, 898 (E.D. Mich 2002) (relying upon *Blount*, 819 F.2d at 152, and *Bender*, 749 F.2d at 1215, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's misrepresentation); *Paycom Billing Services, Inc.* v. *Payment Resources Int'l*, 212 F. Supp. 2d 732, 736 (W.D. Mich. 2002) (relying upon *VanDenBroeck*, 210 F.3d at 701, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's material misrepresentation).

element of mail or wire fraud. *Id.* Underscoring that criminal prosecutions, unlike civil actions, under RICO do not require standing, *Chaz Construction* reasoned that, "[t]herefore, the holding in *Central Distributors* that plaintiffs must plead reliance in order to establish standing in a civil RICO case does not conflict with the holdings in *Neder* and *Daniel....*" *Id.*

Plaintiffs assert that their complaint sufficiently pleads that Plaintiffs detrimentally relied upon the allegedly fraudulent communications underlying the alleged predicate acts, if such detrimental reliance were required. (Resp. Cassens at 17.) Specifically, Plaintiffs' complaint asserts that they relied upon such communications by "suffer[ing] the financial loss of having to pay attorney fees, medical care, and medical mileage." (Compl. at ¶¶ 17, 25, 38, 42, 50, 61, 70.)

As Defendants aptly note, Plaintiffs argue, in essence, that they relied upon the alleged fraudulent communications by challenging and disclaiming the truthfulness or validity of the content of those communications, rather than by assuming the truthfulness or validity of such content and by taking actions based upon that assumption to their detriment. (Cassens Br. at 19.) Yet, the plaintiff must detrimentally rely upon the alleged fraudulent communications by virtue of being "deceived by" them. *See Grantham and Mann, Inc.* v. *American Safety Products., Inc.*, 831 F.2d 596, 606 (6th Cir. 1987). Here, most of the predicate acts of mail and/or wire fraud in Plaintiffs' complaint surround Notices of Dispute or other communications to Plaintiffs setting forth the reason for Defendants' denial of Plaintiffs' workers' compensation benefits, per paragraphs 8, 9, 14,

23, 35, 48, 58, 69, or communications to a particular Plaintiff regarding Defendants' refusal to pay Plaintiff's medical bills pending a workers' compensation appeal or Defendants' assertion that they mistakenly believed that they were not obligated to do so, per paragraph 41 and 41A. However, instead of detrimentally relying upon those communications by virtue of being deceived by their content, Plaintiffs, as their complaint acknowledges, challenged the validity of that content in the first instance. Thus, Plaintiffs' injury arose, not from their reliance upon such fraudulent communications, but, rather, from Defendants' denial of Plaintiffs' workers' compensation benefits. *See Grantham,* 831 F.2d at 606. Moreover, a plaintiff cannot detrimentally rely upon any alleged fraudulent communications that were not directed to him. *Cf. Central Distributors of Beer, Inc.* v. *Conn,* 5 F.3d 181 (6th Cir. 1993). Here, paragraphs 12, 16A, 32, 34, 41, 57, and 68 allege fraudulent communications by Defendants that were not directed at any Plaintiff.

Thus, by failing to plead the key requirement of detrimental reliance, Plaintiffs' RICO claims based upon the predicate acts in paragraphs 8, 9, 12, 14, 23, 32, 34, 35, 41, 41A, 48, 57, 58, 68, and 69 fail to state claims for which relief may be granted. Because Fanaly's RICO claims, which are based upon predicate acts in paragraphs 8, 9, 12, 14, and 16A, fail to plead at least two predicate acts upon which such claims may be granted, they necessarily fail to plead the requisite "pattern of racketeering activity." *See* 18 U.S.C. § 1961(5). Since Brown's RICO claims, which are based upon predicate acts in paragraphs 32, 34, 35, 41, and 41A, fail to plead at least two predicate acts upon which such claims may be granted, they fail to plead the necessary "pattern of

racketeering activity" as a matter of law. Because Orlikowski's RICO claims, which are based upon predicate acts in paragraphs 57 and 58, fail to plead at least two predicate acts upon which such claims may be granted, they necessarily fail to plead the requisite "pattern of racketeering activity." Lastly, since Way's RICO claims, which are based upon predicate acts in paragraphs 68 and 69, fail to plead at least two predicate acts upon which such claims may be granted, they fail, as a matter of law, to plead the necessary "pattern of racketeering activity." In sum, Plaintiffs' RICO claims fail to state claims for which relief may be granted. The Court, therefore, dismisses all of the Plaintiffs' RICO claims.

4. McCarran-Ferguson Preemption

Crawford argues that, under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), the WDCA, M.C.L. 418.101, *et seq.*, reverse-preempts Plaintiffs' RICO claims, which allege that each Defendant engaged in a fraudulent enterprise to deny each Plaintiff of his workers' compensation benefits. (Crawford Br. at 2.) Plaintiffs, in turn, maintain that the McCarran-Ferguson Act does not preempt their RICO claims.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such acts specifically relate to the business of insurance.

The McCarran-Ferguson Act's aim is to establish "a form of inverse preemption, letting state law prevail over general federal rules-those that do not 'specifically relate to the business of insurance.'" *Nationwide Mutual Ins. Co.* v. *Cisneros,* 52 F.3d 1351, 1360 (6th Cir. 1995) (internal quotation marks omitted). However, under the Act, "when Congress enacts a law specifically relating to the business of insurance, that law controls." *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 306, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999). To recap, the McCarran-Ferguson Act precludes the application of a federal statute: 1) that does not "specifically relate to the business of insurance"; 2) in the face of state law "enacted ... for the purpose of regulating the business of insurance"; and 3) where the federal statute would "invalidate, impair, or supersede" the state insurance law. *Id.* at 307, 119 S. Ct. 710.

As to the first prerequisite, the RICO Act is not a federal statute that "specifically relate[s] to the business of insurance." *Humana,* 525 U.S. at 307, 119 S. Ct. 710. Thus, the first prerequisite to reverse-preemption under the Act is met here.

As to the second prerequisite, a state law is "enacted ... for the purpose of regulating the business of insurance" where: 1) it has the "effect of transferring or spreading the policyholder's risk"; 2) it is an "integral part of [the] policy relationships between [the] insurer and [the] insured"; and 3) it is "limited to entities within the insurance industry." *Medical Mut. of Ohio* v. *deSoto,* 245 F.3d 561, 574 (6th Cir. 2001). The Court recognizes that whether Michigan enacted the WDCA "for the purpose of regulating the business of insurance" is, indeed, a thorny issue. The

Court concludes, however, that the WDCA does, in fact, regulate the business of insurance.

First, the Court finds that the WDCA transfers or spreads a risk that is characteristic of insurance. *See Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). As the Michigan Supreme Court has opined, "[t]he primary purpose of the ... [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers." *Simkins,* 453 Mich. at 710, 556 N.W.2d 839.

Second, the Court finds that the WDCA is an "integral part of [the] policy relationships between [the] insurer and [the] insured." *deSoto,* 245 F.3d at 574. The WDCA requires all Michigan employers to provide workers' compensation benefits to their employees, either by self-insuring or by purchasing insurance from a duly-authorized insurance company. If one were to define the employee as the insured and the self-insured employer as the insurer, then the WDCA would, indeed, be an integral part of the policy relationship between the employee and employer, so defined. If one were to define the non-self-insured employer and the employer's insurer or the employee and the employer's insurer as the insured and insurer, respectively, then the WDCA would still be an integral part of the policy relationship between those entities and individuals in that the employer and its insurer have, in essence, contractually agreed to have the insurer fulfill the employer's obligations to its employees under the WDCA.

Lastly, the Court concludes that the WDCA is "limited to entities within the insurance industry." Plaintiffs, in essence, maintain that the WDCA is not

limited to such entities because it reaches self-insured employers and claims' adjusters, like Cassens and Crawford, respectively, and is not limited to insurance companies. (Resp. to Crawford at 1; Resp. to Cassens at 6.) However, as Crawford points out, adjusters of insurance claims are entities within the insurance industry. *See Pireno,* 458 U.S. at 134 n.8, 102 S. Ct. 3002. By electing to self-insure its obligation to provide workers' compensation benefits to its employees, pursuant to the WDCA's strict requirements, the employer, in effect, stands in the stead of an insurance company. The WDCA does not include entities outside of the insurance industry simply because it reaches employees, whom one could characterize as either the insured or the beneficiaries of the insurance. Similarly, the WDCA does not include entities outside of the insurance industry simply because it reaches employers who elect to purchase insurance from an insurance company rather than to self-insure, which employers one could, then, characterize as the insured.

The Court notes that the Michigan Legislature did not expressly associate the WDCA with the regulation of insurance. *See Biondo* v. *Life Ins. Co. of North Am.,* 116 F. Supp. 2d 872, 883 (E.D. Mich. 2000). Rather, as Plaintiffs aptly note, Michigan Complied Laws place the WDCA in Chapter 418 dealing with labor rather than in Chapter 500 in the Insurance Code, and the Michigan's Department of Consumer and Industry Services, rather than the Michigan Insurance Bureau, regulates and has jurisdiction over the WDCA's administrative scheme. (Resp. to Crawford at 2-3; Supplemental Br. at 2.) However, the Court finds that this consideration, while relevant, is insufficient in itself to compel a finding that the WDCA does not regulate the busi-

ness of insurance. Similarly, Plaintiffs' attempt to characterize the provision of workers' compensation benefits as not comprising insurance is unpersuasive. (Resp. to Crawford at 1.) Rather, the term "insurance" denotes "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." BLACK'S LAW DICTIONARY 802 (6th ed. 1990). The WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them. The scope of that bargain—to "compensate ... for the loss on a specified subject by specified perils" or to compensate for work-related injuries here—remains unchanged.

As to the last prerequisite, the Court concludes that the RICO Act would impair the WDCA here. As the Supreme Court held in *Humana Inc.* v. *Forsyth*, when the federal statute does not "directly conflict" with the state law and "when application of the federal law would not frustrate any declared state policy or interfere with a [s]tate's administrative regime," the federal law does not "invalidate, impair, or supersede" the state law. 525 U.S. at 310, 119 S. Ct. 710. According to the Supreme Court, the term "invalidate" denotes "to render ineffective, generally without providing a replacement rule or law," and the term "supersede" denotes "to displace (and thus render ineffective) while providing a substitute rule." *Id.* at 308, 119 S. Ct. 710 (internal quotation marks omitted) (finding that the RICO Act would neither invalidate nor supersede Nevada insurance-fraud law).

The RICO Act and the WDCA do not directly conflict. Rather, one could comply with both the RICO

Act and the WDCA. Moreover, the termination of workers' compensation benefits to which the employee is entitled would be actionable under the WDCA and, where part of a fraudulent RICO enterprise, would be actionable under the RICO Act as well. In other words, the RICO Act would not proscribe conduct—i.e. the termination of workers' compensation benefits to which the employee is entitled-that the WDCA would permit or prescribe. Consequently, the application of the RICO Act in this case would neither "render ineffective" nor "displace" the WDCA or any claim under that Act. Thus, applying the RICO Act here would neither invalidate nor supersede the WDCA.

Rather, at issue is whether applying the RICO Act to this case would "impair" the WDCA. The Supreme Court held that the term "impair" denotes "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Humana,* 525 U.S. at 309-10, 119 S. Ct. 710 (internal quotation marks omitted). Moreover, as the Court noted, a federal law "impairs" a state law where it "frustate[s] any declared state policy or interfere[s] with a [s]tate's administrative regime." *Id.* at 310, 119 S. Ct. 710.

Analyzing *Humana* for the first time in reply, Crawford asserts that the application of the RICO Act in the instant case would "impair" the WDCA because the RICO Act, in affording treble damages and a private right of action, provides Plaintiffs greater recourse than that which the WDCA provides. (Crawford Reply at 2-3, Br. at 5; *See* Cassens Br. at 16.) In *Humana,* the Supreme Court addressed the issue of whether the RICO Act impairs Nevada insurance-law by providing materially-different reme-

dies than that state law for purposes of the McCarran-Ferguson Act. 525 U.S. at 305, 119 S. Ct. 710. The court held that, although the RICO Act authorizes treble damages while Nevada's insurance-fraud law permits recovery of only compensatory and punitive damages, applying the RICO Act in that case would not impair the state law but, rather, would complement its remedial scheme. *Id.* at 313, 119 S. Ct. 710. Specifically, the Court noted that, based upon Nevada law's bad-faith exception to its punitive-damages cap, a plaintiff may be eligible under state law for damages exceeding those under the RICO Act. *Id.* at 313, 119 S. Ct. 710.

Here, Plaintiffs would not be eligible to receive damages equal to or exceeding those available under the RICO Act by virtue of an exception to the exclusive remedies that the WDCA provides. *See* M.C.L.A. 418.131. As discussed below, Plaintiffs' claims of intentional infliction of emotional distress surrounding Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits under Michigan law fail to state claims for which relief may be granted.

As the Court previously noted, the purpose of the WDCA "is to provide ... not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Simkins,* 453 Mich. at 710, 556 N.W.2d 839. Thus, applying the RICO Act here to Plaintiffs' claims that Defendants fraudulently denied Plaintiffs' workers' compensation benefits so as to render Plaintiffs eligible for damages beyond those which the WDCA permits would turn on its head the policy balance that the Michigan legislature struck in the WDCA. Indeed, employees would still receive the speedy and no-fault recovery of

guaranteed compensation for work-related injuries under the WDCA, thereby reaping their respective benefits from that legislative balance. However, imposing liability under the RICO Act upon employers beyond that which the WDCA permits robs those employers of the benefits that they are to receive from the WDCA's policy balance.[11] To impose liability under the RICO Act upon employers' insurers of workers' compensation benefits or the claims' adjusters of those insurers, rather than the employers themselves, would still undermine the WDCA's policy balance in that any such liability would ultimately be passed on to the employers in the form of higher premiums. Thus, the Court concludes that the WDCA reverse-preempts Plaintiffs' RICO claims pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Court, therefore, DISMISSES Plaintiffs' RICO claims on this alternate ground.

5. LMRA Preemption

The Labor Management Relations Act of 1947 ("LMRA") or § 301(a), 29 U.S.C. § 141 *et seq.*, governs the interpretation of collective bargaining agreements ("CBAs"). Section 301, which provides a federal cause of action for a breach of a CBA, states in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting com-

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[11] Plaintiffs argue that applying the RICO Act would encourage employers to pay valid claims rather than to deny them fraudulently and, thus, would promote the WDCA's aim of ensuring employees' quick recovery of benefits. (Resp. at 4.) However, this argument ignores the other half of the bargain that the WDCA struck.

> merce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). "[S]ection 301 not only confers federal jurisdiction over controversies involving ... [CBAs], but also authorizes the federal courts to fashion a body of federal law for the enforcement of section 301." *Terwilliger* v. *Greyhound Lines, Inc.*, 882 F.2d 1033, 1036 (6th Cir. 1989). Moreover, to develop a uniform body of national labor law and "to avoid conflicts in the interpretation of collective bargaining agreements," the federal law governing § 301 preempts state law. *Id.* Pursuant to this preemption doctrine, § 301 governs claims that directly rely upon rights that arise from CBAs and claims that substantially hinge upon the analysis or interpretation of collective bargaining agreements. *Id.*

"[F]ederal labor policy requires that individual employees wishing to assert [labor] contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress." *Id.* at 1039 (internal quotation marks omitted; emphasis in the original). Additionally, unless the employee utilizes the contractual procedures for settling his labor-contract dispute, his independent suit in district court based upon that dispute must be dismissed. *Id.* (internal quotation marks omitted).

Relying upon exhibits attached to its pleadings, Cassens, in its motion to dismiss, maintains that § 301 of the LMRA preempts Plaintiffs' RICO claims. (Mot. at 2-3.) Cassens asserts that Plaintiffs, as union members, were subject to CBAs entitled National

Master Automobile Transporters Agreement ("National CBA") and Central-Southern Area Supplemental Agreement ("Supplemental CBA"). (Br. at 1; Molter Aff., Ex. 1.) As Cassens notes, Article 41 of the National CBA provides:

> Physical, mental or other examinations required by ... the Employer shall be promptly complied with by all employees.
>
> Examinations are ... not to exceed one (1) in any one (1) year, except in emergencies or proven necessity.
>
> The Employer reserves the right to select its own medical examiner or physician, and the Union may, if it believes an injustice has been done an employee, have said employee reexamined at the Union's expense. If the two (2) doctors disagree, the Employer and the Union shall mutually agree upon a third (3rd) doctor whose decision shall be final and binding on both parties. The selection of the third (3rd) doctor shall be made within seven (7) days. The expense of the third (3rd) doctor shall be equally divided between the Employer and the Union.
>
> In those states where Workers' Compensation statutes or regulations do not permit an injured employee to select his/her own treating physician, the Employer shall provide a list or panel of no less than three (3) Board-certified physicians from which the employee may choose, unless prevented by state law.
>
> Employees are required to go to the doctor selected by the Employer.

(Art. 41, Ex. B) Cassens maintains that § 301 of the LMRA preempts Plaintiffs' RICO claims because they do not seek to vindicate a substantive right from a source other than Article 41 of the National CBA.[12] (*Id.* at 11)

As an initial matter, "[t]he use of the term 'preemption' in this setting ... has a dissonant ring to it." *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602, 608, 611 (6th Cir. 2004). Making such an observation, the United States Sixth Circuit Court of Appeals opined:

> To say that federal courts ... [may not] hear a claim under one federal act (RICO) because it is "preempted" by another federal act ... is not a natural use of the term "preemption." As federal courts generally use the term, preemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other.

Trollinger v. *Tyson Foods, Inc.*, 370 F.3d 602, 608, 611 (6th Cir. 2004) (internal quotation marks omitted). The Court further observed that a "cardinal principal of statutory construction" is that, "[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both." *Id.* (internal quotation marks omitted). According to the Court, "[a]bsent an intolerable conflict between the two statutes," courts are unwilling to construe the subsequent federal act as repealing any portion of the for-

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[12] *See, e.g. Chicago District Council of Carpenters Pension Fund* v. *Ceiling Wall Sys., Inc.*, 915 F. Supp. 939 (N.D. Ill. 1996).

mer federal act. *Id.* (internal quotation marks omitted).

In any event, Cassens relies upon materials that transcend the pleadings to support its contention that § 301 of the LMRA preempts Plaintiffs' RICO claims. Having already concluded that Plaintiffs' RICO claims fail as a matter of law, the Court declines, in its discretion, to treat the instant motion to dismiss under that rule as a motion for summary judgment pursuant to Rule 56 for purposes of adjudicating Cassens' contention that § 301 preemption affords another ground for summary dismissal of Plaintiffs' RICO claims.

B. IIED CLAIMS

Plaintiffs' complaint, per Count VII, alleges that Defendants subjected each Plaintiff to the intentional infliction of emotional distress ("IIED") in violation of Michigan law. In particular, Plaintiffs' complaint provides:

> Cassens ... and Crawford ... engaged in a "continuous pattern of harassment, abuse, and unethical conduct," as that phrase was used in *Hailes* v. *Liberty Mutual Ins. Co....*, and also fraudulent conduct, intentionally inflicting emotional distress on plaintiffs and on other Cassens[']employees.... This conduct includes the acts alleged by each [P]laintiff in their complaints....

(Compl. at ¶¶ 75-77.)

Having dismissed all claims over which the Court has original jurisdiction under Rule 12(b)(6) for failure to state claims for which relief may be

granted,[13] the Court would normally decline to exercise pendent jurisdiction, under 28 U.S.C. § 1367, over Plaintiffs' IIED claims. *See Hankins* v. *The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). However, because the resolution of Plaintiffs' IIED claims is necessary to the Court's determination of whether the WDCA reverse-preempts Plaintiffs' RICO claims under the McCarran-Ferguson Act, as addressed above, the Court will exercise pendent jurisdiction over Plaintiffs' IIED claims.

Crawford maintains that Plaintiffs' IIED claims fail to state claims for which relief may be granted. (Crawford Mot. at 2; Cassens Mot. at 22.) While the Michigan Supreme court has yet to recognize formally the tort of IIED, it has described the elements that would be necessary to establish those claims. *Roberts* v. *Auto Owners Ins. Co.*, 422 Mich. 594, 697, 603, 374 N.W.2d 905 (1985). Specifically, a plaintiff would have to demonstrate: 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation; and 4) severe emotional distress. *Roberts*, 422 Mich. at 602, 374 N.W.2d 905. As to the requisite extreme and outrageous conduct, the Court has adopted the following standards that Restatement, Torts, 2d § 46, Commend D, sets forth:

> ... [T]he conduct ... [must be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to

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[13] While Plaintiffs' complaint cursorily alleges that the Court has subject-matter jurisdiction under 28 U.S.C. § 1332, it fails, by virtue of Defendant Margules, to establish the complete diversity of citizenship that § 1332 requires. *See Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 580 n.2, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999).

> be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arose his resentment against the actor, leaving him to exclaim, "outrageous."

Id. at 603, 374 N.W.2d 905.

Plaintiffs, in response, contend that their IIED claims rest upon Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits. (Resp. to Crawford at 6.) Plaintiffs further contend that, under *Broaddus* v. *Ferndale Fastener Div.*, 84 Mich. App. 593, 269 N.W.2d 689 (1978) and *Atkinson* v. *Farley,* 171 Mich. App. 784, 431 N.W.2d 95 (1988), their IIED claims state claims for which relief may be granted. (*Id.*) In *Atkinson,* the Michigan Court of Appeals held that "[a]n insurer's wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." 171 Mich. App. at 790, 431 N.W.2d 95. The Court held, however, that the plaintiff's complaint alleged an IIED claim for which relief could be granted because it alleged the following:

> ... Defendants were in a position of control over [the] plaintiff's sole source of income, and knew that [the] plaintiff was extremely dependent upon the receipt of his [workers' compensation] disability benefits, yet abused their position by interfering with plaintiff's benefits, by ignoring the requirement to deal with his attorney, by threatening to cut off ... [his] benefits, and by demanding that ... [he] repay them a large sum of money.... [D]efendants were abusing their control of

> [the] plaintiff's income ... to harass and intimidate him to gain economic benefit for the insurance company.

Id. at 791, 431 N.W.2d 95. In *Broaddus*, the Michigan Court of Appeals held that the WDCA's exclusive-remedy provision does not bar an action for the intentional infliction of emotional distress surrounding the defendants' alleged collusion in denying workers' compensation benefits where the essence of the tort and the damage alleged is non-physical, such as emotional and mental distress damages. 84 Mich. App. at 597, 600, 600 n.4, 269 N.W.2d 689 (holding that the plaintiffs were not seeking as damages compensation for workers' compensation benefits, and noting that the defendants, on remand, are still free to challenge particular damage claims on the ground that the WDCA renders them compensable so as to bar them under its exclusive-remedy provision). As the Court of Appeals later clarified, *Broaddus* never held that the failure to pay workers' compensation benefits based upon the facts there enabled the plaintiff to recover on his IIED claim. *Lisecki* v. *Taco Bell Restaurants, Inc.*, 150 Mich. App. 749, 755 n.1, 389 N.W.2d 173 (1986). Thus, contrary to Plaintiffs' assertion, neither *Atkinson* nor *Broaddus* sustains a IIED claim based merely upon the fraudulent denial of workers' compensation benefits. (Reply at 4, 6.)

Moreover, in *Hajciar* v. *Crawford & Co.*, the Michigan Court of Appeals even held that a claim that the defendant terminated the plaintiff's workers' compensation benefits to coerce the plaintiff into accepting a lump-sum payment that he had previously refused failed to state the requisite "extreme and outrageous" conduct and, thus, failed to state an IIED claim. 142 Mich. App. 632, 634, 639, 369

N.W.2d 860 (1985). In *Lisecki* v. *Taco Bell Restaurants, Inc.*, the Court of Appeals held that "[t]he facts in *Hajciar* were essentially identical to those presented here, i.e., an allegation by the plaintiff that ... [the defendant] wrongfully terminated [his compensation benefits] ... to further some ulterior motive of the defendants rather than due to the plaintiff's" non-entitlement to those benefits. 150 Mich. App. at 755, 389 N.W.2d 173 (holding so where the plaintiff alleged that the defendant had colluded to claim falsely that the plaintiff's physician had informed the claims' adjuster that the plaintiff had been released to work and where the plaintiff was later discharged from employment and denied workers' compensation benefits). According to the Court, "such conduct simply cannot be characterized as outrageous and atrocious." *Id.* (noting that the plaintiff had an adequate remedy for the termination of benefits with his WDCB claim).

Plaintiffs' complaint asserts that Defendants engaged in a "continuous pattern of harassment, abuse, and unethical conduct." *See Hailes* v. *Liberty Mutual Ins. Co.*, No. 215509, 1999 WL 33326762 (Mich. App. Dec. 28, 1999) (suggesting that "facts evidencing a continuous pattern of harassment, abuse, and unethical conduct" may constitute the requisite "extreme and outrageous conduct" for purposes of stating an IIED claim). Yet, as Crawford aptly notes, it fails to allege any facts that would evidence such conduct. (Crawford Br. at 9.) Rather, as Plaintiffs seemingly concede, the factual allegations underlying their IIED claims simply evidence Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits. (Resp. to Crawford at 6.)

Thus, Plaintiffs' IIED claims fail to state claims for which relief may be granted and are subject to dismissal under Rule 12(b)(6).[14]

III. SUMMARY

For the preceding reasons, the Court:

1) DISMISSES Plaintiffs' RICO claims because they fail to state claims for which relief may be granted, and because the WDCA reverse-preempts those claims under the McCarran-Ferguson Act; and

2) DISMISSES Plaintiffs' state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

SO ORDERED.

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[14] In its motion to dismiss, Cassens maintains that § 301 of the LMRA preempts Plaintiffs' IIED claims because those claims arise from Article 41 of the National CBA and are "inextricably intertwined with" the interpretation of the terms of that CBA. (Cassens Br. at 9.) Because Plaintiffs' IIED claims fail to state claims for which relief may be granted under Michigan law, the Court need not and does not reach this issue.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

No. 05-2089

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAUL BROWN, ET AL.,

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT CO., ET AL.,

Defendants-Appellees.

Filed Jan. 5, 2009

BEFORE: MOORE and GIBBONS, Circuit Judges; and ACKERMAN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

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* Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX D

SECTION 2(B) OF THE MCCARRAN-FERGUSON ACT

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SELECTED PROVISIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or

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other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney

General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income,

or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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(8)

Supreme Court, U.S.
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No. 08-1375

IN THE

Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,

Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under the McCarran-Ferguson Act's reverse-preemption provision, no federal statute may be construed to "impair" a state law enacted "for the purpose of regulating the business of insurance." The questions presented are:

1. Whether the Sixth Circuit erred in holding that the Michigan Worker's Disability Compensation Act (WDCA) is not a law enacted "for the purpose of regulating the business of insurance" based on the following independent rationales:

   (a) Workers' compensation benefits under the WDCA are not insurance.

   (b) The purpose of the WDCA was not to regulate the business of insurance.

   (c) Self-insurance is not the business of insurance.

2. Whether, even if the Sixth Circuit's holding and all three of those rationales were incorrect, a claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) seeking remedies for a pattern of fraud in the denial of workers' compensation benefits would "impair" the WDCA.

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INTRODUCTION

The McCarran-Ferguson Act's reverse-preemption provision precludes federal statutes from operating to "impair" state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). The Sixth Circuit held that respondents' RICO claims—alleging fraudulent denial of workers' compensation benefits by their self-insured Michigan employer—do not run afoul of that provision.

For three independent reasons, the court below correctly concluded that this case does not threaten state law enacted "for the purpose of regulating the business of insurance." *First*, workers' compensation benefits are not insurance in the first place. *Second*, the purpose of Michigan's workers' compensation statute is not insurance regulation. *Third*, self-insurance is not insurance. And even if insurance were at issue, state law would not be "impaired" under this Court's unanimous decision in *Humana, inc. v. Forsyth*, 525 U.S. 299 (1999), which held that RICO claims seeking remedies unavailable under state law for fraud by an insurer were not precluded by the McCarran-Ferguson Act.

The petition does not contend that this case implicates any conflict among the lower courts, let alone a conflict on an important question of federal law. Instead, the petition asks this Court to grant review because petitioners believe the Sixth Circuit mischaracterized Michigan law. This Court does not sit to resolve disputes that turn on the law of a single state, particularly where, as here, the case is in an interlocutory posture and implicates no circuit split. In any event, the Sixth Circuit's rejection of petitioners' reverse-preemption theories was correct on multiple grounds—and no court has held otherwise.

STATEMENT

1. The Facts. Respondents are six current and former Michigan employees of Cassens Transport Company. They allege that Cassens, along with co-defendants Crawford & Company and Dr. Saul Margules, conspired to fraudulently deny them workers' compensation benefits, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961(1)(B), 1962(c), 1964(c). Crawford is a contractor charged with administering workers' compensation claims made by Cassens employees, and Dr. Margules was a physician charged with determining the respondents' eligibility for benefits.

Respondents allege that Cassens and Crawford deliberately and systematically made use of "cut-off doctors"—physicians, like Margules, whom Cassens and Crawford knew would reliably provide fraudulent medical opinions stating that a claimant did not have a work-related disability, regardless of whether such a disability existed and despite known medical evidence to the contrary. Pet. App. 3a.

Cassens is in the business of transportation, not insurance. As permitted by Michigan law, the company does not maintain any insurance to cover claims by its workers under the Michigan Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws §§ 418.631-418.801. Instead, Cassens is "self-insured," meaning that the company may "make payments directly to [its] employees as the employees become entitled to receive the payment" under the WDCA. Mich. Comp. Laws § 418.611(1)(a).

2. The Proceedings Below. Petitioners (collectively, "Cassens") sought dismissal of respondents' complaint on any of seven alternate grounds, arguing that their

RICO and state-law claims were barred by (1) the primary-jurisdiction doctrine; (2) the *Burford* abstention doctrine;[1] (3) failure to plead predicate acts of witness tampering; (4) failure to plead predicate acts of mail or wire fraud with particularity; (5) failure to plead detrimental reliance; (6) reverse preemption under the McCarran-Ferguson Act; and (7) preemption under the Labor Management Relations Act. The district court decided, among other things, that the RICO claims were reverse preempted and, in any event, failed to state claims for which relief could be granted. Pet. App. 32a.

A divided Sixth Circuit panel initially affirmed the dismissal, holding that respondents had failed to plead detrimental reliance on the alleged misrepresentations. *Brown v. Cassens Transp. Co.*, 492 F.3d 640 (6th Cir. 2007). This Court vacated and remanded that decision for further consideration in light of *Bridge v. Phoenix Bond & Indemnity Co.*, --- U.S. ---, 128 S. Ct. 2131 (2008), which held that a RICO plaintiff need not plead detrimental reliance.

3. The Decision Below. On remand from this Court's GVR order, the Sixth Circuit unanimously reversed the district court's dismissal. Pet. App. 1a. The court held that respondents sufficiently alleged that Cassens had engaged in a pattern of racketeering activity and that their injuries were caused by the alleged fraud. Pet. App. 4a-15a. As for the McCarran-Ferguson Act, the court held that respondents' RICO claims were not reverse preempted because this case does not implicate any state laws enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

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[1] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

First, the court rejected Cassens' "benefits-as-insurance" theory—the notion that workers' compensation benefits themselves are a form of insurance, creating an "insurance-like relationship in which the employer is the 'insurer' and the employee is the 'insured.'" Pet. App. 19a. To the contrary, the court found all three factors this Court uses to assess whether a practice is "insurance" under the McCarran-Ferguson Act to be lacking: (1) workers' compensation does not have "the effect of transferring or spreading a policyholder's risk" to an insurer, but instead replaces an employer's preexisting common-law duty with a statutory compensation requirement; (2) there is no contractual "policy relationship" between an insurer and an insured who agrees to indemnify the insured against risk in exchange for consideration; and (3) the law is not "limited to entities within the insurance industry," but covers all employers. *Id.* 20a-21a (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

Second, the court held that the purpose of the WDCA was not to regulate insurance, but to replace the employer's preexisting tort duty with a statutory requirement "to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault." *Id.* 21a. That insurance regulation was not the purpose, the court observed, is underscored by the fact that the WDCA is placed in the labor code, not the insurance code, and administered by the Worker's Compensation Agency, not state insurance regulators. *Id.* 22a.

Third, although the first two holdings "each independently foreclose[d]" the reverse-preemption defense, the court also addressed Cassens' "insurance-provisions" theory—which relies on the fact that the WDCA contains provisions allowing an employer to buy insurance to

secure workers' compensation payments. Under that theory, "the employer is the insured and the company providing the insurance is the insurer." *Id.* 23a. Although that theory might apply to certain insurance transactions, the court explained, it fails here because this case does not involve insurance for yet another reason: Cassens is self-insured, and self-insurance is not the business of insurance. *Id.* 24a.

Finally, the Sixth Circuit "note[d]" that the reverse-preemption defense would fail even if workers' compensation were insurance because respondents' RICO claims would not "impair" the WDCA under the framework articulated by this Court in *Humana*, 525 U.S. 299, which also involved the interaction between RICO and the McCarran-Ferguson Act. Pet. App. 26a. Under *Humana*, "[w]hen federal law does not directly conflict with state regulation, and when application of federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Humana*, 525 U.S. at 310. First, because *Humana* calls for an "as applied" analysis, and because Cassens self-insures, the court found no risk that RICO would impair any state policy relating to insurance regulation. Pet. App. 26a. Second, as in *Humana*, there was no evidence that state law would tolerate fraud, or that the RICO claims would frustrate any declared state policy or administrative scheme, and the state filed no brief to the contrary. *Id.* 26a-27a.

Cassens filed a petition for rehearing en banc, focusing primarily on its disagreement with the panel's characterization of Michigan law. Because no judge requested a vote on whether to rehear the case en banc, the petition was summarily denied. *Id.* 74a.

REASONS FOR DENYING THE WRIT

I. THE FIRST QUESTION TURNS LARGELY ON STATE LAW, IMPLICATES NO CIRCUIT SPLIT, AND WAS CORRECTLY DECIDED BELOW.

Cassens does not contend that this case implicates any conflict among the lower courts on an important question of federal law. Instead, its chief complaint about the decision below, to which it devotes the bulk of its petition (Pet. 10-24), boils down to its dissatisfaction with the way that a panel of the Sixth Circuit characterized Michigan law.

Specifically, Cassens criticizes the Sixth Circuit's conclusion that this case does not implicate state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Emphasizing that Congress's concept of the "business of insurance" was derived "largely from state law, from state practice, from state usage," Pet. 15, Cassens contends that the Sixth Circuit misunderstood the purpose and effect of Michigan's workers' compensation regime. The petition repeatedly criticizes the Sixth Circuit for "tak[ing] no account of the actual content of the applicable state law," *id.* 13, overlooking "how Michigan actually treats workers' compensation benefits," *id.* 15-16, and neglecting to "carefully parse" the Michigan statute. *Id.* 17.

This Court, however, does not generally grant certiorari to resolve disputes that turn on the law of a single state. A decision on such a question, "whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of [] certiorari jurisdiction," *Leavitt v. Jane L.*, 518 U.S. 137, 146-47 (1996) (Stevens, J., dissenting), and the Court's custom in such disputes is to "defer to the interpretation of the

Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004); *see MacGregor v. State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam) ("[W]e shall leave undisturbed the interpretation [of Michigan law concerning insurance] by three circuit judges whose circuit includes Michigan.").

In any event, the Sixth Circuit carefully analyzed Michigan's workers' compensation law under the test articulated by this Court in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982). Pet. App. 17a-24a. That test uses three factors to assess whether a certain practice constitutes the "business of insurance" under the McCarran-Ferguson Act. Based on its analysis of Michigan law, the court concluded that none of the three factors is present: (1) the WDCA does not transfer risk, but is rather a replacement for the employer's preexisting tort liability; (2) there is no insurance contract, and no insurer-insured policy relationship; and (3) the WDCA applies to all employers, not only to the insurance industry. Pet. App. 20a-21a. The petition agrees that the *Pireno* factors supply the correct test, but takes issue with their "application" in this case "to the Michigan's workers' compensation statute." Pet. 2, 4. Certiorari, however, is unwarranted where the asserted error consists of no more than "the misapplication of a properly stated rule of law." S. Ct. Rule 10. And as demonstrated below, the court's application of the law was correct for three wholly independent reasons.

A. Workers' Compensation Benefits Under Michigan Law Are Not Insurance.

The Sixth Circuit correctly rejected Cassens' "benefits-as-insurance" theory—the theory that workers' compensation benefits under Michigan law are them-

selves "insurance" within the meaning of the McCarran-Ferguson Act. The petition cites no authority, state or federal, adopting that theory. Indeed, the petition neglects to acknowledge considerable authority to the contrary.[2]

In the face of that contrary authority, the best support Cassens can muster is a snippet of case law describ-

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[2] *See, e.g.*, *Harrison v. Digital Health Plan*, 183 F.3d 1235, 1241 (11th Cir. 1999) ("Workers' compensation is not insurance in the ordinary sense of the term[.]"); *Wash. Ins. Guar. Ass'n v. Dep't of Labor and Indus.*, 859 P.2d 592, 595 (Wash. 1993) ("Workers' compensation benefits are paid under state law, not under an insurance policy.") (citation omitted); *Ala. Ins. Guar. Ass'n v. Magic City Trucking Serv., Inc.*, 547 So. 2d 849, 850-53 (Ala. 1989) ("Although an employer's obligations under the Workmen's Compensation statutes are often insured, workmen's compensation benefits are not insurance benefits."); *Nance by Nance v. West Side Hosp.*, 1986 WL 10886, at *3 (Tenn. Ct. App. 1986), *aff'd*, 750 S.W.2d 740 (Tenn. 1988) ("Worker's compensation is not insurance. It is the statutory responsibility and liability of the employer to furnish to an injured employee treatment and other benefits provided by law.") (citations omitted); *Aetna Ins. Co. v. Smith*, 568 S.W.2d 11, 14 (Ark. 1978) ("Workmen's compensation is not insurance, and it was not contemplated that it be so considered. . . . It is illusory to say that the injured workman had paid for workmen's compensation benefits or that workmen's compensation is a type of disability insurance."); *Auto Salvage Co. v. Rogers*, 342 S.W.2d 85, 89 (Ark. 1961) ("[T]he Workmen's Compensation Act is not an insurance policy.") (citation omitted); *Laird v. State Highway Dep't*, 323 P.2d 1079, 1089 (Idaho 1958) ("This Court has in numerous cases stated that Workmen's Compensation is not insurance[.]"); 9 COUCH ON INSURANCE § 133:2 (2009) ("Workers' compensation programs, requiring that employers compensate employees, are not themselves insurance."); Floyd L. Daggett, *Workmen's Compensation in Washington State*, in PROCEEDINGS OF THE NATIONAL CONVENTION OF INSURANCE COMMISSIONERS 229 (1914) ("Workmen's compensation is not insurance and should not be confused with the insurance idea. Insurance means a contract between the insured and the insurer.").

ing workers' compensation as "insurance of a social character." Pet. 2, 16 (quoting *Lauder v. Paul M. Wiener Foundry*, 72 N.W.2d 159, 172 (Mich. 1955)). But, as Michigan courts have recognized, "social insurance" programs (such as Medicare, Social Security, or unemployment compensation) are a very different animal from "the business of insurance." *See Imvris v. Mich. Millers Mut. Ins. Co.*, 198 N.W.2d 36, 38 (Mich. Ct. App. 1972) ("Medicare is social welfare legislation passed by the Congress to aid the general health and welfare of those over 65 years of age. Although classified as social insurance, it is clearly not an insurance program within the ordinary meaning of the term insurance."); Lloyd Harger, Fla. Div. of Workers' Comp., *Workers' Compensation: A Brief History*, http://www.fldfs.com/wc/history.html ("Workers' compensation is not 'insurance'; rather, it is social insurance, much the same as unemployment compensation and social security."); *see also Flemming v. Nestor*, 363 U.S. 603, 609 (1960) (contrasting Social Security, which is "a form of social insurance," with insurance and pension plans, which are contractual).

Nevertheless, Cassens argues (at 14) that the Sixth Circuit was wrong to regard the WDCA as imposing a statutory compensation obligation on employers rather than creating a "true contractual accident-insurance relationship." Pet. App. 20a. In this regard, Cassens cites several cases for the proposition that Michigan law regards the obligation to pay workers' compensation benefits as an implied term of the employment contract. While the Michigan Supreme Court has "characterized workers' compensation as a liability arising out of the contract of employment," it has "nonetheless consistently emphasized that workers' compensation is a matter of statutory grace," *Selk v. Detroit Plastic Prods.*, 345 N.W.2d 184, 188 (Mich. 1984)—a feature that

makes it distinctly unlike an insurance contract. The court uses that same phrase—"a matter of statutory grace"—to describe the status of other social insurance programs, such as unemployment compensation. *Dow Chem. Co. v. Curtis*, 430 N.W.2d 645, 650 (Mich. 1988).[3]

That Michigan law sometimes characterizes the statutory obligation to pay benefits as arising out of the *employment* contract, moreover, does not in any way create a contractual *insurance* relationship between an insurer and insured. "By its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1087 n.17 (1983). Insurance, at a minimum, requires a "contract by which

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[3] Both this Court and the Michigan Supreme Court have made clear that benefits under the Michigan WDCA—as with other social insurance programs but unlike true contractual relationships—may be altered by the legislature without impairing the freedom of contract. *See McAvoy v. H.B. Sherman Co.*, 258 N.W.2d 414, 432-33 (Mich. 1977); *Lahti v. Fosterling*, 99 N.W.2d 490, 495-99 (Mich. 1959). In *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), a case Cassens cites, this Court rejected GM's Contract-Clause challenge to an amendment mandating retroactive payments under the WDCA because there was "no contractual relationship regarding the specific workers' compensation terms allegedly at issue." *Id.* at 186-87. The Court also rejected GM's argument that the WDCA was "an implied term of the contracts" because "Michigan law does not explicitly imply a contractual term allowing an employer to depend on the closure of past disability compensation periods." *Id.* at 188; *see also Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979) ("Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time."); *Cudahy Packing Co. of Neb. v. Parramore*, 263 U.S. 418, 423 (1923) (workers' compensation rests not upon "implied contract," but upon a statutory entitlement to compensation).

one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency." Pet. App. 19a (quoting *Black's Law Dictionary*); *see Norris*, 463 U.S. at 1087 n.17 (distinguishing between the "business of insurance" and the employer-employee relationship, and stressing that insurance "involves some investment risk-taking on the part of the company"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212 (1979) (describing the "underwriting or spreading of risk" as an "indispensable characteristic of insurance"). By contrast, "workers' compensation regimes substitute" for preexisting "tort liability." *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 662 (2006). Because it replaces a preexisting duty, the workers' compensation scheme does not transfer risk from an insured to an insurer, Pet. App. 20a—a point the petition fails to rebut.

B. Michigan's Workers' Compensation Statute Was Not Enacted for the Purpose of Regulating the Business of Insurance.

Along the same lines, the petition gives short shrift to one of the key independent rationales on which the Sixth Circuit relied in rejecting Cassens' reverse-preemption defense: that the Michigan WDCA was not enacted for the *purpose* of regulating the "business of insurance." As the decision below explained, the purpose of the WDCA "was to require an employer to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault." Pet. App. 21a-22a (quoting WELCH, WORKER'S COMPENSATION IN MICHIGAN: LAW AND PRACTICE § 1.2 (4th ed. 2001)); *see also McAvoy*, 258 N.W.2d at 423 (the "objective" was "to provide the disabled worker with benefits during the period of his disability"). As discussed above, that com-

pensation objective has always been understood not as creating a contractual insurance relationship that transfers risk from an insured to an insurer, but as replacing a pre-existing duty—a purpose that is fundamentally incompatible with Cassens' benefits-as-insurance theory. Pet. App. 20a.

Cassens' position, in other words, cannot be reconciled with what this Court has called "the essential character of workers' compensation regimes. Unlike pension provisions or group life, health, and disability insurance plans," workers' compensation statutes "modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents." *Howard Delivery Serv.*, 547 U.S. at 66; *see D.C. v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 134 (1992) (Stevens, J., dissenting) ("Workers' compensation laws provide a substitute for tort actions by employees against their employers."); 6 LARSON & LARSON, WORKERS' COMPENSATION LAW 100-2 (2005). As the Michigan Supreme Court put it in 1934, the "paramount object has been for the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases." *Johns v. Wisc. Land & Lumber Co.*, 256 N.W. 592, 594 (Mich. 1934); *see also Grand Rapids v. Crocker*, 189 N.W. 221, 224 (Mich. 1922) ("The statute is a remedial one."). Cassens points to no countervailing evidence to suggest that the purpose of the WDCA was to regulate the business of insurance. That failure "independently foreclose[s]" Cassens' reverse-preemption defense. Pet. App. 22a.

C. Self-Insurance Is Not the Business of Insurance.

1. The petition also devotes several pages (18-24) to its disagreement with the Sixth Circuit's "additional[] note" (Pet. App. 22a), which concluded that the practice of "self-insurance" does not fall within the "business of insurance" for purposes of the McCarran-Ferguson Act.

Once again, the petition cites no authority reaching a contrary conclusion under the McCarran-Ferguson Act. Indeed, the petition conspicuously omits any mention of the overwhelming body of law holding that self-insurance is not "insurance" at all, let alone the "business of insurance."[4] Nor does the petition acknowledge that the standard insurance-law treatises take the same position.[5]

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[4] *See, e.g., Esposito v Simkins Indus., Inc.*, 943 A.2d 456, 465 (Conn. 2008) ("[T]he fact that a self-insuring employer has chosen to retain its own workers' compensation risk rather than purchase insurance does not transform a company's business to that of insurance. . . . [T]he employer is not 'doing any kind or form of insurance business[.]'"); *Morrison v. Toys "R" Us, Inc.*, 806 N.E.2d 388, 391 (Mass. 2004) ("A self-insuring employer under the workmen's compensation law does not become an insurance company."); *Simmons v. Puu*, 94 P.3d 667, 683 (Haw. 2004) ("[S]elf-insurance is not insurance at all."); *Chambi v. Regents of Univ. of Cal.*, 95 Cal App. 4th 822, 825 (Cal. Ct. App. 2002) ("It is axiomatic that self-insurance is not insurance. . . . [S]elf-insurance, which is equivalent to no insurance, is repugnant to the concept of insurance which fundamentally involves the shifting to a third party, by contract, for a consideration, the risk of loss as a result of an incident or event."); *Doucette v. Pomes*, 724 A.2d 481, 489-90 (Conn. 1999) ("[A] self-insurer is not an insurer" and "self-insurance is not insurance at all."); *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 336 (Tex. App. 1999) ("[A] self-insurer does not provide insurance at all."); *Cordova v. Wolfel*, 903 P.2d 1390, 1392 (N.M. 1995) ("Most authorities agree that self-insurance is not insurance. Insurance is a contract whereby for consideration one party agrees to indemnify or guarantee

(Footnote continued...)

As these authorities make clear, when Cassens "did not purchase insurance to cover its risk" but instead "complied with the Workers' Compensation Act by retaining its own risk," it was not "transformed into an insurer." *Doucette*, 724 A.2d at 481. Instead, Cassens "retained its character as an employer that simply elected to pay the expenses associated with its employees' work-related accidents. Although this is commonly referred to as self-insuring, there was no transfer of risk, which is generally considered to be an essential element of an insurance relationship." *Id.* In short, a "self-insuring employer under the workmen's compensation law does not become an insurance company," and hence is not "engaged in the business of insurance." *Anzalone v. Mass. Bay Transp. Auth.*, 526 N.E.2d 246, 248 (Mass.

(...continued)
another party against specified risks."); *Bowens v. Gen. Motors Corp.*, 608 So.2d 999, 1003 (La. 1992) ("[S]elf-insurance is, in actuality, not insurance at all."); *Physicians Ins. Co. of Ohio v. Grandview Hosp. & Med. Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) ("[S]elf-insurance is not insurance; it is the antithesis of insurance. Insurance shifts the risk of loss from an insured to an insurer. Self-insurance is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract."); *Am. Nurses Ass'n v. Passaic Gen. Hosp.*, 471 A.2d 66, 69 (N.J. Super. Ct. App. Div. 1984) (same).

[5] *See, e.g.*, KEETON & WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES § 1.3(c), at 13-14 (1988) ("[A]lthough an entity that handles the risk of tort claims in this manner is sometimes referred to as a 'self-insurer,' this approach involves no insurance as the term is ordinarily used in regulatory statutes or in other legal contexts."); 12 APPLEMAN & APPLEMAN, INSURANCE LAW AND PRACTICE § 7002, at 22 (1981) ("A certificate of self-insurance can in nowise be equated with an insurance contract or policy"); DENENBERG, ET AL., RISK AND INSURANCE 79 (1964) ("For those who believe that transfer of risk is a requisite for insurance, the term self-insurance is a misnomer since it permits no transfer.").

1988); *see also Ogden v. Mont. Power Co.*, 747 P.2d 201, 204-05 (Mont. 1987); *Richardson v. GAB Bus. Servs., Inc.*, 207 Cal. Rptr. 519, 523-25 (Cal. Ct. App. 1984).

The case law in some states distinguishes between independent self-insurers like Cassens, which are not in the business of insurance at all, and self-insurer *group* plans, which take on certain characteristics of insurance (chiefly, the pooling of risk among employers). But in Michigan, even such "self-insurer groups have not historically been considered to be engaged in the business of insurance so as to be normally subject to regulation by the Insurance Commissioner." *Health Care Ass'n Workers Comp. Fund v. Dir. of the Bureau of Worker's Comp.*, 694 N.W.2d 761, 769 (Mich. Ct. App. 2005). In short, Cassens' discussion of self-insurance is incompatible with the overwhelming weight of authority.

2. Stretching to create the appearance of a conflict on this point, the petition (at 18-21) contends that the Sixth Circuit's analysis of self-insurance "cannot be squared" with this Court's decisions in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002). The claimed conflict is illusory.

To begin with, both cases involved ERISA, not workers' compensation or the McCarran-Ferguson Act. And unlike the McCarran-Ferguson Act, which is concerned with whether certain practices constitute "the business of insurance," ERISA's insurance-savings clause "asks merely whether a state law . . . 'regulates insurance, banking, or securities.'" *Miller*, 538 U.S. at 340 (contrasting 15 U.S.C. § 1012(b) with 29 § 1144(b)(2)(A)); *see* Pet. App. 18a n.6. In *Miller* itself, this Court made "a clean break from the McCarran-Ferguson factors" for purposes of ERISA, explaining

that, in light of the substantially different language in the two statutes, "use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and . . . added little to the relevant analysis." 538 U.S. at 339-42.

If anything, *Miller*'s discussion of self-insured group plans actually weakens Cassens' position. In the footnote on which Cassens relies, the Court concluded that the mere fact that a Kentucky statute regulating insurance plans also applied to self-insured non-ERISA group plans "did not forfeit[] its status" as a law regulating insurance under ERISA. *Id.* at 336 n.1; *see also Rush Prudential HMO*, 536 U.S. at 372 ("[T]here is no reason to think Congress would have meant such minimal application to noninsurers to remove a state law entirely from the category of insurance regulation saved from preemption."). In reaching that conclusion, this Court stressed not only that such group plans (unlike independent self-insureds) pool risk among employers, but also that ERISA's insurance-savings clause (unlike the McCarran-Ferguson Act) "does not require that a state law regulate 'insurance companies' or even 'the business of insurance'" to fall within its coverage. *Miller*, 538 U.S. at 336 n.1. The latter distinction suggests that the analysis would be quite different under the McCarran-Ferguson Act—even as to the group plans involved in that case.

II. THE SECOND QUESTION DEPENDS ON THE OUTCOME OF THE FIRST QUESTION, AND IS EQUALLY UNCERTWORTHY.

The second question presented asks whether respondents' RICO claims would "impair" Michigan's workers' compensation law. But that question only arises if Cas-

sens can overcome all three of the rationales put forth by the Sixth Circuit on the first question presented. Cassens, in other words, must first demonstrate that (1) statutory workers' compensation benefits are truly insurance, (2) Michigan's workers' compensation law was enacted for the purpose of regulating the business of insurance, *and* (3) self-insurance is indeed insurance. Because Cassens failed below on all three counts, the Sixth Circuit did not engage in as extensive an analysis of the impairment question, but instead "note[d]," in the alternative, its rejection of Cassens' position. Pet. App. 24a.

Even assuming these hurdles could be overcome, the second question presented is no more certworthy than the first. Once again, Cassens seeks error correction, faulting the Sixth Circuit for failing to "engage in any independent consideration of the relevant state law," and for misapplying this Court's decision in *Humana* to the facts of the case. Pet. 24-29. Neither complaint justifies review.

The petition first attacks the Sixth Circuit's conclusion that, "because Cassens self-insures, there is no risk of any impairment of state policy relating to the regulation of insurance." Pet. App. 26a. But Cassens questions only the premise of that statement, repeating its claim that self-insurance is insurance. Given the overwhelming authority for the proposition that self-insurance is *not* the business of insurance, discussed above in Part I.C, this rationale provides reason enough to reject the reverse-preemption defense.

In the alternative, the petition attacks the Sixth Circuit's analysis under the framework established by this Court in *Humana*. Again, Cassens does not raise

any important question of federal law, but takes issue only with the application of *Humana* to Michigan law.

In *Humana*, this Court considered whether the McCarran-Ferguson Act precludes beneficiaries from bringing RICO claims alleging a pattern of fraud on the part of an insurer, where the remedies available under RICO are different from those available under state law. *Humana*, 525 U.S. at 305. The Court held that, even though Nevada had a competing but less robust system of remedies for the same fraudulent conduct, the application of RICO to a pattern of fraudulent denial of insurance did not "frustrate any declared state policy or interfere with [the state's] administrative regime," and hence "the McCarran-Ferguson Act does not preclude its application." *Id.* at 310.

The Sixth Circuit correctly concluded that "*Humana* applies equally here." Pet. App. 26a. There is neither authority for the proposition that Michigan has a declared state policy permitting fraudulent denial or precluding a federal civil action arising out of such conduct, nor any evidence that its administrative scheme precludes such a federal action. *Id.* 25a-27a. The petition complains that a RICO suit would "disrupt" Michigan's "system of remedies," a complaint that was also made by the defendants in *Humana*. Pet. 26. If anything, the case for impairment was *stronger* in *Humana*, where Nevada law expressly prescribed a different, lesser damages remedy for precisely the same conduct. Finally, as in *Humana*, "the fact that the state 'filed no brief at any stage of this lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative scheme' further

supports the conclusion that there is no impairment here." *Id.* 27a (quoting *Humana*, 525 U.S. at 314).[6]

III. THE INTERLOCUTORY POSTURE OF THIS CASE UNDERSCORES THAT REVIEW SHOULD BE DENIED.

Apart from the soundness of the decision below and the absence of any conflict on an important issue of law, certiorari is also unwarranted because this case is in an interlocutory posture. The Sixth Circuit held that the district court erred in dismissing the complaint and remanded the case for proceedings on the merits. Should Cassens prevail on the merits, the questions it now seeks to present will become academic. Should respondents prevail on the merits, Cassens will be able to present those issues to this Court following entry of a final judgment. This Court ordinarily awaits the entry of final judgment before granting review, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), and there is no reason to depart from that settled practice here. *See* GRESSMAN, ET AL., SUPREME COURT PRACTICE 280 (9th ed. 2007).

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[6] The petition contends, in passing, that the decision below clashes with the "approach" of circuits that have found reverse preemption where state law did not "provide remedies comparable to those available under RICO." Pet. 29-30. *Humana*, however, holds that the fact that federal law "provides materially different remedies," standing alone, does not compel reverse preemption. 525 U.S. at 305. In any event, other circuits have rejected reverse preemption where state law provides no remedy at all. *See, e.g., Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 232 (4th Cir.), *cert. denied*, 543 U.S. 979 (2004); *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1099 (10th Cir. 1999).

On remand, the court or jury will be free to find for Cassens on any lawful ground, in which case review of the question presented would not be necessary (or appropriate). This case is an even less appropriate vehicle for immediate, interlocutory review than was *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college that excluded women was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, there has been no decision regarding liability, let alone the appropriate remedy.

Of course, respondents believe they will prevail on the merits. If they do, Cassens may appeal from the final decision and, ultimately, petition the Court on the reverse-preemption defense (or any other properly preserved federal issue). *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was *sui generis*, here, if Cassens is correct that the issue of reverse preemption in RICO fraud suits against self-insured employers arises frequently in the courts of appeals, there will be any number of appropriate future vehicles that would allow this Court to resolve the question. In the meantime, the Court should stay its hand and allow the case to run its course.

IV. CASSENS AND ITS AMICI EXAGGERATE THE PRACTICAL IMPACT OF THE DECISION BELOW.

Lacking a conflict concerning an important legal issue, Cassens and its amici resort to sweeping and unsupported statements about the practical effects of the decision below. Pet. 30-33. But, as explained above, the premise underlying many of these predictions is itself wrong. Cassens' warnings—that the decision "threaten[s] to interfere with state insurance regulation" and "disrupt Congress's allocation of responsibility between the States and the federal government in matters of insurance regulation"—merely restate its position on the merits. Pet. 30, 31. If any one of the Sixth Circuit's three independent rationales on the first question presented is correct, then there is no potential for disruption of state insurance regulation because the regulation of insurance is not even at issue: Workers' compensation is not insurance, and self-insurance under a workers' compensation scheme is even further afield.

In any event, the speculation of Cassens and its amici is just that: speculation. It has been a full year since the Sixth Circuit's decision in this case was first handed down and no appellate court, state or federal, has either adopted or rejected Cassens' benefits-as-insurance or insurance-provisions theories. Nor has there been a flood of lawsuits. Ten years ago, just before this Court unanimously held in *Humana* that the RICO fraud suit there was not reverse preempted, industry amici made similarly dire predictions, speculating that allowing such suits would "seriously threaten sound insurance regulation by the several states." Br. for Alliance of Am. Ins., et al. as Amici Curiae 18-30, in *Humana v. Forsyth* There is no evidence that those predictions proved true. Better to await the final disposition of the proceedings in

this case and additional decisions on the viability of Cassens' novel reverse-preemption theories than to prematurely grant review concerning questions that may not ever produce disagreement among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

We explain in more detail below the legal points on which respondents' brief in opposition goes astray. But the most notable thing about the brief is an omission: respondents barely even attempt to deny that the Sixth Circuit's approach would substitute litigation for the efficient, low-cost administrative process that is now the central element of *all* state workers' compensation programs. Because this holding would substantially undermine the efficacy of state workers' compensation regimes – and because the decision below also departs in material and destructive ways from this Court's decisions construing the McCarran-Ferguson Act – further review is warranted.

A. The Holding Below Will Undermine Workers' Compensation Systems

To begin with, respondents are manifestly wrong in their blithe assertion that the decision below will not have significant and far-reaching real-world consequences. Until this point, the defining characteristic of workers' compensation has been the way in which it is walled off from the system of litigation. The essential bargain of workers compensation is its use of a quick, efficient, and low-cost administrative process that provides broad but limited benefits: "Workers' compensation regimes * * * provide something for employees – they ensure limited fixed payments for on-the-job injuries – and something for employers – they remove the risk of large judgments and heavy costs generated by tort litigation." *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 663 (2006).

But as we show in the petition (at 30-33) and as the *amici* supporting the petition demonstrate in detail (see, *e.g.*, Chamber Br. 12-15; Mich. Defense Trial Counsel ("MDTC") Br. 17-20) – and as respondents very notably do not deny – the Sixth Circuit's holding would turn this principle on its head. The court of appeals' rule would allow all disgruntled workers' compensation claimants who allege improper motives by their employers to bring suit in federal court. The attractiveness of the generous federal RICO remedies will encourage such litigation, which in turn will require federal courts to substitute their judgment for that of the expert decision-makers ordinarily entrusted with resolution of workers' compensation disputes. See DRI Br. 6. This is not a theoretical prospect; the Court has recognized in closely related contexts that the prospect of prolonged and expensive litigation encourages a proliferation of strike suits. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007) (antitrust); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (securities).

This development will vastly add to the expense and detract from the efficacy of the workers' compensation process. Respondents make no pretense that a decision leading to such an outcome is consistent with settled law: they point to *no* decision (other than the one below) allowing use of a federal cause of action to challenge the denial of state workers' compensation benefits, and we are aware of none. Yet many such suits unquestionably are coming in the wake of the Sixth Circuit's ruling: *amicus* Chamber of Commerce points to a number of such suits that already have been brought against some of the Nation's leading employers (Br. 14), and more have

since followed. See, *e.g.*, *Gianzero* v. *Wal-Mart Stores, Inc.*, No. 09-cv-00656 (D. Colo. filed Mar. 24, 2009).

Respondents do maintain that the Court should await development of a clear conflict in the circuits on the question presented here before granting review. Opp. 1, 6. But whatever the usual wisdom of that course, there is no reason for delay here. Even as confined to the Sixth Circuit, the holding below affects well over 10 million workers, hundreds of thousands of employers, and (potentially) many billions of dollars in annual workers' compensation claims. See MDTC Br. 17-18. It also will likely affect the primary activities of businesses that are forced to abandon self-insurance in response to the Sixth Circuit's decision. *Id.* at 18-20. Yet this Court may have limited opportunities to review the issue in the future, as the prospect of enormous class action RICO liability may lead employers to settle rather than fully litigate strike suits. See Chamber Br. 14-15. And there is nothing to be gained from delay; both sides of the legal arguments are presented by the conflicting decisions of the district court and the court of appeals in this case. In these circumstances, "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring).[1]

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[1] Respondents also are wrong in urging denial of review on the ground that the Sixth Circuit's decision is interlocutory. Opp. 1, 19-20. The issue presented here is one of pure law and has been finally resolved by the court of appeals; whatever happens on remand, that decision will remain on the books to govern conduct in the Sixth Circuit. Interlocutory posture is no "impediment to certiorari" when the decision below "has decided an

B. The Sixth Circuit's Decision Cannot Be Reconciled With Holdings Of This Court

The need for immediate review is particularly sharp because the Sixth Circuit departed from this Court's guidance in several significant respects.[2]

1. *Workers' compensation programs that transfer risk regulate the business of insurance.*

First, respondents are simply wrong in asserting categorically that workers' compensation does not involve "insurance." Opp. 7-9. Quite the contrary is so: the Court has generically described workers' compensation regimes as "a compulsory *insurance* system," has referred to the requirement that employers provide (or obtain) "workers' compensation *insurance*" – and because "[s]elf-insured employers and private insurers face identical obligations under [a workers' compensation system substantially identical to Michigan's], [the Court] therefore [has] refer[red] to them collectively as '*insurers*' or '*private insurers*.'" *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 44 & n.1 (1999) (emphasis added).

There is no mystery why this is so. In Michigan, as in most States, risk-shifting workers' compensation terms are implied into every employment con-

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important issue, otherwise worthy of review," and resolution of that issue by the Court "may serve to hasten or finally resolve the litigation." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 4.18, at 282 (9th ed. 2007).

[2] Respondents suggest that review should be denied because the court of appeals offered several alternative bases for its holding. Opp. 1, 17. But the Sixth Circuit's decision surely cannot be insulated from review because the court erred not in one, but in several related respects.

tract, and a contract whose risk-shifting terms are fixed by statute is nonetheless an insurance contract. See *Arroyo-Melecio* v. *Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 62, 68-69 (1st Cir. 2005) (holding that claims challenging operation of "compulsory [automobile] liability insurance" scheme were claims about the "business of insurance").[3] In this respect, respondents misstate our argument when they contend, repeatedly, that we are contesting the Sixth Circuit's reading of state law (Opp. 1, 6-7); the Sixth Circuit's error was in its misreading of the *federal-law* consequences of state rules found across the Nation.

Respondents' principal response to this point is their insistence that, "[b]ecause it replaces a preexisting duty, the workers' compensation scheme does not transfer risk from an insured to an insurer." Opp. 11. But this, too, is simply wrong. In fact, prior to the creation of workers' compensation "only a small percentage of injured workers received *any* recovery." *Howard Delivery*, 547 U.S. at 671 (Kennedy, J., dissenting) (emphasis added). See Chamber Br. 9-10; MDTC Br. 13 (prior to workers' compensation laws, no more than 20% of injured workers received compensation). At that time, the employee "assumed the entire risk of injury in ordinary cases," "leaving

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[3] The contrary decisions cited by respondents (Opp. 8 n.2) construed state laws that did not treat the workers' compensation obligation as implied in the employment contract. See, *e.g.*, *Harrison* v. *Digital Health Plan*, 183 F.3d 1235, 1241 (11th Cir. 1999) (per curiam) (statement that "[w]orkers' compensation is not insurance" premised on understanding that workers' compensation is *not* "based on a contract implied by law between the employer and the employee"); *Wash. Ins. Guar. Ass'n* v. *Dep't of Labor*, 859 P.2d 592, 595 (Wash. 1993) (conclusion based on view that, under Washington law, workers' compensation "is not the equivalent of a contract").

the entire loss to rest where it may chance to fall." *N.Y. Cent. R.R.* v. *White*, 243 U.S. 188, 204 (1917)). Workers' compensation doubtless *replaced* these tort regimes (see *Howard Delivery*, 547 U.S. at 662 (majority opinion)), but in the vast majority of cases its principal effect was the *transfer* to the employer of the risk of injury that previously had rested with the employee. That is the hallmark of insurance.

For the same reason, respondents are incorrect in asserting that workers' compensation regimes cannot be understood to have been enacted for the purpose of regulating the "business of insurance" (Opp. 11-12): if we are correct that regulation of the contractual transfer of the risk of workplace injuries *is* regulation of the business of insurance, the WDCA surely was enacted for the purpose of regulating that business.

2. Self-insurance is part of the business of insurance.

Respondents also depart from McCarran-Ferguson principles and this Court's decisions when they defend the Sixth Circuit's rule that self-insurance is not "insurance." See Opp. 13-16. In fact, "[f]or most purposes [relating to workers' compensation], the position of self-insurers is assimilated to that of insurance carriers." LARSON ON WORKERS' COMPENSATION § 150.01[2] (2007). Under Michigan law (which in this respect is similar to the law of many other States, see Pet. 14 n.2), the obligation to pay workers' compensation benefits arises from risk-allocation provisions that are implied as matter of law into *every* covered employment agreement, whether that agreement is guaranteed by self- or by third-party insurance. There can be no serious dispute that such provisions effect the contractual

transfer of a class of risks from the employee to the employer in the manner of insurance – at the very least, of the risks posed by the substantial majority of workplace injuries for which the employee would otherwise be considered at fault. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). Indeed, many of the authorities cited by respondents (at 13-14 & n.4) agree that transfer of risk is the hallmark of insurance.[4]

Moreover, the contractual transfer of risk under the WDCA – from employees to their employers – operates in precisely the same way whether the employer self-insures or purchases insurance; the WDCA regulates the "actual performance" (*United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 503 (1993)) of this transfer by requiring employers either to purchase insurance or to obtain approval to self-insure. See Mich. Comp. Laws § 418.611; accord *Am. Mfrs.*, 526 U.S. at 44 n.1. Under such state statutes, employers who self-insure and employers who purchase insurance assume identical obligations to compensate employees for covered workplace injuries. Pet. 21. Consequently, "self-insurance in the worker's compensation arena is the functional equivalent of purchasing a commercial insurance policy." *Heinz* v. *Chicago Rd. Inv. Co,*, 549 N.W.2d 47, 54 (Mich. Ct. App. 1996).[5] The McCarran-Ferguson Act should be

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[4] *E.g.*, *Doucette* v. *Pomes*, 724 A.2d 481, 490 (Conn. 1999) ("[The] transfer of risk * * * is generally considered to be an essential element of an insurance relationship."); *Physicians Ins. Co.* v. *Grandview Hosp. & Med. Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) ("Insurance shifts the risk of loss from an insured to an insurer.").

[5] *McClain* v. *Begley*, 465 N.W.2d 680, 682 (Minn. 1991) ("The law of workers' compensation treats self-insurers no differently

understood to protect the Michigan's legislature's considered judgment that self-insured employers be treated identically to insurance carriers in the administration of workers' compensation benefits. See *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 67, 69 (1959) (concept of "business of insurance" "take[s] on its coloration and meaning largely from state law, from state practice, from state usage").

Indeed, respondents do not even attempt to deny the analogy between employers who self-insure workers' compensation and HMOs. See Pet. 20-21. Like HMOs, self-insured employers are contractually obliged to indemnify others for a class of covered risks, yet do not pass on these risks to a third-party insurer. Nonetheless, there is "no serious question" that HMOs are insurers. See *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 367-79, 373-74 (2002). Respondents' sole response is that *Rush Prudential* considered the Employee Retirement Income Security Act of 1974 (ERISA), and so has no bearing on what practices constitute the "business of insurance" under the McCarran-Ferguson Act. Opp. 15-16. Although respondents are correct that *Kentucky Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. 329 (2003), forswore the use of the *Pireno* factors in the ERISA context, nothing in *Miller* undermined *Rush Prudential*'s analysis of the insurance-like features of HMOs. In that connection, the Court's discussion

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than those who insure by commercial policy. The purpose of either form of insurance is to compensate victims appropriately."); see also ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 12[c] (4th ed. 2007) (remarking that self-insurance is often "treated as being equivalent to the 'business of insurance'" when a "statutory scheme require[s] businesses to purchase liability insurance[,] but excus[es] them from the requirement" if they obtain approval to self-insure).

could not be clearer: "HMOs actually underwrite and spread risk among their participants, a feature distinctive to insurance" (536 U.S. at 367), so that "HMO contracts are, in fact, contracts for insurance" (*id.* at 374).

3. The application of RICO would impair state law.

Finally, respondents' discussion confirms that the Sixth Circuit's holding reflects serious confusion about the rule of *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 310 (1999) – or a palpable attempt to evade the decision in that case. There is no doubt that the law of Michigan, like that of virtually all States, does not allow the imposition of special penalties for the assertedly wrongful denial of workers' compensation benefits (see Pet. 26); respondents do not contend otherwise.[6] And respondents offer absolutely no reason to doubt that this state system, which is premised on a streamlined administrative process that precludes litigation, would be "impaired" by the availability of a federal cause of action. See Opp. 18.

Respondents nevertheless contend that *Humana* supports a holding that there is no "impairment" even when state law "'provides materially different

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[6] Under Michigan law, there is no tort remedy for the wrongful withholding of workers' compensation benefits, even if the purpose of doing so was to "further some ulterior motive." *Lisecki* v. *Taco Bell Rests., Inc.*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) (per curiam); see Pet. 27-28 & n.8. An employer may dispute its liability for paying benefits without facing any penalties, even if its position was "inconsistent and nonsensical" or pursued in "bad faith." See *Warner* v. *Collavino Bros.*, 347 N.W.2d 787, 789-90 (Mich. Ct. App. 1984) (per curiam); *Couture* v. *Gen. Motors Corp.*, 335 N.W.2d 668, 670 (Mich. Ct. App. 1983) (per curiam).

remedies'" than federal law for the same conduct. Opp. 19 n.6 (quoting *Humana*, 525 U.S. at 305). But the quoted passage comes from the *Humana* Court's paraphrase of the question presented in that case. The Court's *actual* holding turned on the *absence* of material differences in the remedies provided by Nevada insurance law and RICO. Nevada permitted both statutory and common-law claims for insurance fraud, under which punitive damages were available. *Id.* at 313-14. Indeed, under Nevada law, plaintiffs were eligible to receive damages "*exceeding* the treble damages available under RICO." *Id.* at 313 (emphasis added). Thus, it was easy to conclude that the remedies available under RICO would "complement," rather than impair, Nevada's remedial regime. *Ibid.*

That manifestly is not the case here.[7] The WDCA, like most workers' compensation statutes, creates a "hermetically sealed" (cf. *Humana*, 525 U.S. at 312) administrative regime providing limited and exclusive remedies for workplace injuries. *See* ATA Br. 15-19; DRI Br. 9-13. In Michigan, the "pri-

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[7] It also was not so in *American Chiropractic Ass'n* v. *Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004), and *BancOklahoma Mortgage Corp.* v. *Capital Title Co.*, 194 F.3d 1089 (10th Cir. 1999). Respondents mischaracterize (Opp. 19 n.6) those decisions as cases in which courts "rejected reverse preemption where state law provides no remedy at all." In fact, although state *insurance* laws did not provide remedies in those cases, it was crucial to the decisions that *other* state laws *did*. See *Am. Chiropractic*, 367 F.3d at 232; *BancOklahoma*, 194 F.3d at 1099-1100. By contrast, when "state insurance laws closely regulate the very activity forming the basis of a plaintiff's claim, '[t]he absence of a state-level cause of action counsels in favor of barring the federal lawsuit.'" *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1322 (S.D. Fla. 2002); accord *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999).

mordial intent" of the "exclusivity provision" in the WDCA was that, in exchange for assuming the obligation to compensate employees for workplace injuries on a no-fault basis, employers would receive "outright and absolute immunity from liability (*except as provided in the [WDCA]*) stemming from each compensable injury." *Downie* v. *Kent Prods., Inc.*, 362 N.W.2d 605, 613 (Mich. 1984) (emphasis added). Superposing RICO liability on top of the WDCA's "limited and determinate" administrative remedies (*Simkins* v. *Gen. Motors Corp.*, 556 N.W.2d 839, 844 (Mich. 1996)), as the Sixth Circuit thought permissible, does grave violence to Michigan's regulatory regime. If that outcome really is consistent with *Humana*, it should be this Court, and not the Sixth Circuit, that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULIES,

Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

MOTION OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the American Trucking Associations, Inc. ("ATA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners. Counsel for petitioners has consented to the filing of this brief, but counsel for the respondents has withheld consent.

ATA is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Arlington, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before this Court and other courts.

This case raises important and recurring questions concerning the scope of the McCarran-Ferguson Act, which was enacted to prevent inadvertent federal regulation that impairs insurance regulation by the States. In the decision below, the Sixth Circuit ruled that the Act does not bar a civil action brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, seeking to recover not only treble damages but also attorneys' fees based on an employer's allegedly fraudulent refusal to pay benefits under a state workers' compensation scheme. If left uncorrected, the decision below could seriously disrupt

the proper functioning of state workers' compensation schemes in the Sixth Circuit and elsewhere, make self-insurance a far less desirable option, and severely weaken the protections afforded by the McCarran-Ferguson Act. Because ATA's members have a substantial interest in avoiding all of these deleterious effects, *amicus* has a strong interest in ensuring that review is granted in this case and the Sixth Circuit's flawed decision is corrected.

ATA's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

The case presents two questions of substantial importance concerning the meaning of the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. § 1011 *et seq.* Specifically, the Sixth Circuit ruled that respondents' effort to use the battering-ram of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), to challenge an employer's denial of workers' compensation benefits was not precluded by the McCarran Act because (1) Michigan's Workers' Compensation Act does not regulate the "business of insurance," and (2) the application of RICO would not "impair" the exclusive Michigan administrative scheme for resolving disputes over such benefits. *Amicus* agrees for all the reasons identified by petitioners that the Sixth Circuit's "business of insurance" ruling is flawed, will undermine the right of businesses to self-insure, and warrants this Court's review. That holding

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[1] Counsel of record for all parties received timely notice of the *amicus curiae*'s intent to file this brief. S. Ct. Rule 37.2(a). Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

also overlooks this Court's teaching that state workers' compensation laws are, at bottom, "*a compulsory insurance system* requiring employers to compensate employees for work-related injuries without regard to fault." *American Mfrs. Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 44 (1999) (emphasis added).[2]

For reasons of space, however, *amicus* will focus on the lower court's second holding. As explained below, the Sixth Circuit's resolution of the "impairment" question independently warrants review because it is inconsistent with certain aspects of this Court's decision in *Humana, Inc.* v. *Forsyth*, 525 U.S. 299 (1999), provides a valuable opportunity to clarify other aspects of *Humana*, and, if left uncorrected, would threaten to disrupt the operation of state workers' compensation schemes across the country.

A. The McCarran Act

Before 1944, this Court had "consistently held that the business of insurance was not commerce." *Humana*, 525 U.S. at 306; see, *e.g.*, *Hooper* v. *California*, 155 U.S. 648, 654 (1895). As a consequence, for the first century and a half after the founding of the Republic the insurance industry was "largely immune from federal regulation." *Humana*, 525 U.S. at 306; see also *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S.

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[2] This Court's view is consistent with that of the leading treatise on workers' compensation law. See 1 A. LARSON & L. LARSON, LARSON'S WORKERS' COMPENSATION LAW, at 1-1 (2008) (characterizing workers' compensation as a type of insurance for "providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the costs of these injuries ultimately on consumers * * * in the cost of the product.") (emphasis added); *id.* § 1.03[7], at 1-12 (insurance is "an integral part of the whole scheme").

531, 539 (1978) ("[T]he States enjoyed a virtually exclusive domain over the insurance industry.").

In 1944, this Court abruptly changed course, ruling that a fire insurance company that conducted a substantial part of its transactions across state lines was engaged in interstate commerce – and subject to the Sherman Act. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). This decision "provoked widespread concern that the States would no longer be able to engage in * * * effective regulation of the insurance industry." *Barry*, 438 U.S. at 539. In response, Congress "moved quickly" to "restore the supremacy of the States in * * * insurance regulation" by enacting the McCarran Act in 1945. *Ibid.*

Section 1 of the McCarran Act declares that "continued regulation * * * by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Section 2(a) provides, in turn, that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *Id.* § 1012(a). Congress backed up Section 2(a)'s commitment to the primacy of state law in the field of insurance by broadly providing, in Section 2(b), that federal legislation not specifically related to the business of insurance shall not be "construed to *invalidate, impair, or supersede any* law enacted by *any* State for the purpose of regulating the business of insurance." *Id.* § 1012(b) (emphasis added). Section 2(b) thus "ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana*, 525 U.S. at 306.[3]

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[3] In interpreting the McCarran Act, this Court has instructed that

B. This Court's Decision in *Humana*

In *Humana* v. *Forsyth*, this Court examined the meaning of the critical, disjunctive terms of Section 2(b) of the McCarran Act: "invalidate," "supersede," or "impair." The case involved a private civil suit brought under RICO. The suit charged a group health insurer with engaging in a pattern of fraud whereby it received discounts for hospital services that it did not pass on to its policy beneficiaries. The plaintiffs sought treble damages as a remedy.

This Court narrowly ruled that "RICO can be applied *in this case* in harmony with" Nevada's laws governing insurance. 525 U.S. at 303 (emphasis added). In reaching that conclusion, the Court carefully examined the standard of conduct sought to be enforced, the procedural mechanisms, and the available remedies in the underlying RICO action, and compared them with those available under Nevada law. "The acts the policy beneficiaries identify as unlawful under RICO," the Court first explained, "are also unlawful under Nevada law." *Id.* at 308. Beyond that, the Nevada Unfair Insurance Practices Act, which sets forth an "administrative scheme that prohibits various forms of insurance fraud and misrepresentation," specifically authorizes a "private right of action" in the courts for those injured by insurance fraud. *Id.* at 311-12. And the Nevada Unfair Insurance Practices Act, the Court emphasized, "is *not hermetically sealed*; it

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the Act should "be read as protecting the right of the States to regulate what they traditionally regulated" – in particular, what Congress regarded (and the statute referred to) as the "business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18, 221 (1979).

does not exclude application of other state laws, statutory or decisional." *Id.* at 312 (emphasis added). For example, the Court reasoned, Nevada *common law* also imposes an independent duty on insurers to deal with their policyholders fairly and in good faith, and it permits plaintiffs who bring suits for insurance bad faith to recover punitive damages awards that are exempt from the usual Nevada cap of three times compensatory damages. *Id.* at 313. "Accordingly," the Court reasoned, "plaintiffs seeking relief under Nevada law may be eligible for damages *exceeding* the treble damages available under RICO." *Ibid.* (emphasis added).

In addition to very carefully analyzing Nevada law and comparing it to RICO, the Court parsed the text of Section 2(b) of the McCarran Act. "Impair," the Court explained, means "'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" 525 U.S. at 309-10 (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990)). The Court drew support from *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 102 (1983), a preemption case, which concluded that to "'impair' a law is to hinder its operation or 'frustrate [a] goal' of that law." 525 U.S. at 311. In light of this broad definition of "impair," the Court in *Humana* firmly rejected the notion that "impair[ment]" requires a direct conflict between the federal and state provisions. *Id.* at 309 (Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation").

Based on the foregoing analysis, the Court distilled the essence of Section 2(b) into this formula: "When federal regulation does not directly conflict with state

regulation, and when application of the federal law would not [1] frustrate any declared state policy or [2] interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 525 U.S. at 310 (emphasis added). Applying this two-part formulation, the Court concluded that there was "no frustration of state policy in *the RICO litigation at issue here*" (525 U.S. at 313 (emphasis added)), which sought to apply the same standard of conduct, in the same procedural setting (a private lawsuit), as Nevada law would provide, and which sought a remedy that was less than what a Nevada court (or jury) could award.

C. The Michigan Workers' Compensation Act

Today most States have in place detailed workers' compensation schemes that originated in the first two decades of the twentieth century – long before the McCarran Act was enacted, at a time when States "enjoyed a virtually exclusive domain over the insurance industry." *Barry*, 438 U.S. at 539; see also I A. LARSON, *supra*, § 2.08, at 2-15; L. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 352-55 (2002). Michigan's workers' compensation system, which dates back to 1912, is typical in its objective of "replac[ing] the common-law system" for recovering compensation in the courts for job-related injuries "with a compulsory insurance system requiring employers to compensate employees for work-related injuries without regard to fault." *Sullivan*, 526 U.S. at 44; see also WORKERS' COMPENSATION AGENCY, MICHIGAN DEPT. OF LABOR & ECON. GROWTH, AN OVERVIEW OF WORKERS' COMPENSATION IN MICHIGAN 2 (2006) ("OVERVIEW").

Toward that end, the Michigan Workers' Compensation Act ("MWCA") abolishes the employer's tradi-

tional common-law defenses of contributory negligence, assumption of risk, and the "fellow servant" rule, and imposes an obligation on employers to compensate workers for any injuries suffered on the job, without regard to fault. OVERVIEW, at 3; MICH. COMP. LAWS §§ 418.141, 418.301; see also Pet. 4-5. At the same time, and "[i]n return for this almost automatic liability, the [MWCA] limited the amount that a worker could recover * * * to (1) certain wage loss benefits, (2) the cost of medical treatment, and (3) certain rehabilitation services." OVERVIEW, at 2; see also MICH. COMP. LAWS §§ 418.301 to 481.391. "Under the old system," in contrast, " workers had been able to recover for pain and suffering, loss of enjoyment of life, and other damages that a jury might award." OVERVIEW, at 2.

The Michigan scheme makes clear that, with certain exceptions not relevant to this case, "the right to the recovery of benefits as provided in [the MWCA] shall be the employee's *exclusive remedy*" for a non-intentional workplace injury. MICH. COMP. LAWS § 418.131(1) (emphasis added); see also *id.* § 418.841(1). The statute sets up a detailed administrative scheme for resolving disputes over the denial of workers' compensation claims through mediation, arbitration, or administrative hearings, including the right to take appeals to the Workers' Compensation Appellate Commission. OVERVIEW, at 31-35; MICH. COMP. LAWS §§ 418.841, 418.847 to 418.867; see also L. FRIEDMAN, *supra*, at 354-55 ("the new system did not operate through courts, but administratively; it was supposed to work quickly, almost automatically, without muss or fuss"). Significantly, under Michigan law it is clear that this administrative scheme – with its carefully limited remedies and streamlined procedures – also provides the exclusive remedy for a claim

that workers' compensation benefits were wrongfully withheld from an employee. See Pet. 26-28; MICH. COMP. LAWS § 418.841(1) ("Any dispute or controversy concerning compensation or other benefits shall be submitted to the [B]ureau [of Workers' Compensation] and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable.").

The MWCA also contains detailed provisions relating to the security and funding of workers' compensation benefits, including the requirement that employers either obtain workers' compensation insurance or self-insure. See MICH. COMP. LAWS § 418.611, 418.621; Pet. 5-6.[4] It also authorizes a state agency, the Bureau of Workers' Compensation, to administer the system and to impose penalties on employers for, among other things, failing to pay benefits that are owed. See MICH. COMP. LAWS §§ 418.201-418.205, 418.801(2) (penalties, capped at $1500, for nonpayment of benefits).

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[4] Employers favored the adoption of workers' compensation schemes not only because they limited recovery and replaced expensive litigation with streamlined administrative processes, but also because they addressed the serious problem of the rapidly rising cost of employer's liability insurance. Fishback & Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J. L. & ECON. 305, 317-18 (1998). Insurance companies "also stood to gain from" and thus supported "the passage of workers' compensation schemes" because these laws "compelled employers to insure their entire payrolls." *Id.* at 310. The Michigan statute includes extensive provisions relating to how the scheme will be funded through insurance and other risk-pooling measures. MICH. COMP. LAWS §§ 418.501, 418.611, 418.621; see also Pet. 5-6, 21-23.

D. The Proceedings Below

1. Respondents are six current or former employees of Cassens Transport Company. After their claims arising out of alleged workplace injuries for workers' compensation benefits under Michigan law were denied, respondents brought a RICO lawsuit against petitioners Cassens, Crawford & Company (which had contracted with Cassens to provide claims adjustment services), and Dr. Saul Margules (a physician who examined some of the respondents concerning their entitlement to benefits). Pet. App. 2a-3a, 33a. In their RICO claim, respondents alleged that petitioners had employed wire and mail fraud in a scheme to deny them workers' compensation benefits under the MWCA. Specifically, respondents alleged that "Cassens and Crawford deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions, and * * * ignored other medical evidence in denying them benefits." *Id.* at 3a. Respondents sought treble damages and attorneys' fees.

2. The district court granted petitioners' motion to dismiss the RICO claim pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 3a, 32a-33a. Among other things, the court concluded that respondents' RICO claim was barred by the McCarran Act. Pet. App. 33a, 57a-64a. On the question of impairment, the district court, citing and relying on *Humana*, reasoned that "applying the RICO Act here * * * would turn on its head the policy balance that the Michigan legislature struck in the [MWCA]" because the MWCA (unlike RICO) does not provide claimants with a judicially enforceable private right of action or permit the recovery of treble damages and attorneys' fees. Pet. App. 62a-63a; see also *id.* at 45a (taking note of Michigan's "significant interest in

safeguarding the policy balance that the legislature struck * * * by ensuring employees' speedy and no-fault recovery of guaranteed compensation for workplace injuries and by shielding employers * * * from liability beyond that which the [MWCA] permits").

3. The Sixth Circuit reversed. Pet. App. 1a-31a. On the issue of impairment, the court first observed that both the MWCA and respondents' RICO claim seek to enforce a similar liability standard – both prohibit the denial of benefits to workers who are entitled to them (with RICO punishing this conduct "if done as part of a pattern of racketeering activity"). Pet. App. 25a. Accordingly, the Sixth Circuit reasoned, "[t]he only aspect of RICO that would arguably impair the [MWCA] is the *difference in remedies* provided for under RICO," which "allows for treble damages and attorneys' fees" whereas the MWCA provides for a daily penalty of $50 after 30 days of delinquency by the employer with a maximum penalty of $1500. Pet. App. 25a-26a (emphasis added). The Sixth Circuit did not acknowledge, much less analyze, the MWCA's creation of an exclusive administrative system for resolving benefits disputes (to replace private rights of action enforceable in judicial proceedings).

Next, the Sixth Circuit purported to draw support from *Humana* for its conclusion that there was no impairment here. Pet. App. 26a-27a. That case, the Sixth Circuit explained, rejected an impairment argument even though directed at a federal law that provided "materially different remedies" from the relevant state laws. *Id.* at 26a.

Finally, the Sixth Circuit attached significance to the fact that the MWCA's prohibition against nonpayment of benefits owed encompasses but is not limited

to the "fraudulent" denial of such benefits. Pet. App. 26a-27a. That feature, the court opined, shows that respondents' RICO suit does not frustrate any "declared" state policy under *Humana* (525 U.S. at 310). The Sixth Circuit also faulted the district court for relying on the impairment of "the WDCA's policy of limited liability for employer," explaining that Michigan has no "policy of limited liability for employers" when "they *fraudulently* deny workers' compensation benefits." Pet. App. 27a (emphasis added).

INTRODUCTION AND SUMMARY OF ARGUMENT

The McCarran Act embodies the federal government's longstanding commitment to preserving the traditional regulatory autonomy of the States over the insurance business. The Act advances this goal by directing that, as a general matter, federal laws not "specifically relate[d] to the business of insurance" (such as RICO) shall not be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Nevertheless, in this litigation, respondents are attempting to use the hammer of civil RICO – with its treble damages and attorneys' fees remedies – to circumvent the critical limitations on recovery embodied in Michigan's workers' compensation system. Respondents' RICO action also squarely conflicts with the Michigan legislature's decision to replace judicially enforceable private rights of action, with all their attendant expense and uncertainty, with an exclusive and streamlined administrative scheme for resolving all benefit disputes in cases (such as this) not involving intentional torts.

In holding that respondents' RICO action does not impair Michigan's workers' compensation scheme, the Sixth Circuit strayed from this Court's decision in *Humana, Inc.* v. *Forsyth*, 525 U.S. 299 (1999). Far from supporting the Sixth Circuit's conclusions, *Humana* points the other way. Although *amicus* wholeheartedly agrees that both issues presented in the petition are worthy of the Court's review, this brief focuses on the impairment issue. As explained below, further review of that issue is especially warranted for two reasons First, the Sixth Circuit's analysis is squarely at odds, in several important respects, with *Humana*. Second, this case is an excellent vehicle for clarifying the scope of the McCarran Act and certain issues that *Humana* left open.

ARGUMENT

I. The Sixth Circuit's Decision Ignores Or Departs From The Teachings Of *Humana*

As explained above (at 4-6), this Court in *Humana* carefully examined each of the operative terms of the McCarran Act – "invalidate," "supersede," and "impair" – and set forth a general framework for analyzing issues arising under the statute: "When federal law does not directly conflict with state regulation, and when application of the federal law would not [1] frustrate any declared state policy or [2] interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 525 U.S. at 309-10 (emphasis added). In addition to identifying two distinct ways (in addition to direct conflicts) in which the McCarran Act would preclude the application of a general federal law to the business of insurance, this Court clearly held that the

term "impairs" extends beyond situations where federal and state law conflict.

Using this analytical framework, the Court in *Humana* proceeded to examine carefully the liability standards, the procedural mechanisms, and the remedies available under Nevada law – and compared them with those available in the policyholders' RICO lawsuit. In so doing, the Court assessed the likely impact of the RICO lawsuit not only on individual Nevada statutes but also on the State's "comprehensive administrative regime" as a whole. 525 U.S. at 311-14.

The Sixth Circuit's decision in this case ignores or departs from *Humana*'s teachings in at least four ways. *First*, the Sixth Circuit focused largely on whether the application of RICO would "frustrate any declared state policy" but made no apparent effort to examine another, recognized way in which RICO could "impair" the MWCA – by "interfering with a State's administrative regime" *as a whole*. *Humana*, 525 U.S. at 309-10. The Sixth Circuit ignored – or overlooked – the fact that this Court conducted just such an analysis in *Humana* itself. See, *e.g.*, 525 U.S. at 311-12 (examining Nevada's "comprehensive administrative scheme" and observing that it is "not hermetically sealed; it does not exclude application of other state laws, statutory or decisional"). As petitioners persuasively demonstrate (Pet. 26), the application of respondents' RICO action would plainly interfere with Michigan's administrative regime for resolving disputes over workers' compensation claims because that regime *was intended to be exclusive*.

Second, the Sixth Circuit applied too narrow a focus in examining whether the application of respondents' RICO suit would "frustrate any declared state

policy." For starters, Michigan's policy of exclusivity in administrative remedies for workers' compensation benefit claims *is* unequivocally expressed in the MWCA. See MICH. COMP. LAWS § 418.131(1) (emphasis added); see also *id.* § 418.841(1). Beyond that, there is no reason for courts to insist upon a formal declaration by the State of its "purposes" in the text of a statute (or an *amicus* brief) as a precondition to full enforcement of the McCarran Act. While such evidence may be helpful in cases where the existence of a state policy is disputed, there is no reason why courts cannot examine and identify state policies as embodied in legislation just as they do in other cases of statutory construction. Had the Sixth Circuit grasped this point, it would have realized that the district court was correct to conclude that "applying the RICO Act here * * * would turn on its head the policy balance that the Michigan legislature struck in the [MWCA]" because the MWCA (unlike RICO) does not provide claimants with a judicially enforceable private right of action or permit the recovery of treble damages and attorneys' fees. Pet. App. 62a-63a.

Third, the Sixth Circuit failed to conduct a careful, independent examination of state law as a predicate to its impairment analysis, even though *Humana* makes clear that such an examination is essential to a meaningful comparison of the relevant state and federal standards of conduct, procedural mechanisms, and remedies. See Pet. 24, 25-28. Specifically, the Sixth Circuit apparently failed to grasp that Michigan law does not recognize any private right of action or judicially cognizable claim based on the intentional withholding of workers' compensation benefits. See Pet. 27-28 (citing cases). As explained above (at 6-8), a major objective of the MWCA was to *replace* judicial proceed-

ings based on tort law with a compensation scheme in which disputes would be handled administratively.

Fourth, the Sixth Circuit understood *Humana* as supporting its holding that there was no impairment here because, in its view, the *Humana* Court rejected an impairment argument even though directed at a federal law that provided "materially different remedies" from the relevant Nevada laws. Pet. App. 26a-27a (quoting the *Humana* Court's paraphrasing of the question granted review, 525 U.S. at 305). But that characterization overlooks the *Humana* Court's *analysis*, which turned on the *lack of material differences* in the remedies actually provided by Nevada law and the RICO suit at issue there.

Whether viewed as inconsistencies with this Court's teachings in *Humana*, or simply as reasons why the decision below is wrong, these aspects of the Sixth Circuit's decision demonstrate why this Court's intervention is needed.

II. This Case Represents An Ideal Vehicle For Resolving Issues Left Open In *Humana* And Clarifying The Scope Of The McCarran Act

Humana turned out to be an exceedingly easy case to resolve under the legal framework announced by the Court in that case. The reason is straightforward: The standards of conduct, procedures, and remedies involved in the underlying RICO lawsuit in *Humana* were all strikingly similar to the substantive standards, procedures, and remedies available under Nevada law. See 525 U.S. at 311-14. Federal and state regimes both prescribed exactly the same standard of conduct (prohibiting fraud by an insurer against a policyholder). Moreover, both regimes contemplated

private civil actions as a means of targeting the proscribed conduct. And both regimes allowed the recovery of extraordinary damages. While RICO authorizes private parties to recover treble damages (18 U.S.C. § 1964(c)), Nevada law authorized the recovery of punitive damages (including in excess of three times compensatory damages).

Given these similarities, this Court had no difficulty concluding that Nevada's approach to policing insurance fraud was in no way frustrated – but instead was "complement[ed]" and "advance[d]" (525 U.S. at 313-14) – by allowing the RICO action to proceed. Precisely because *Humana* turned out to be such an easy case to resolve against McCarran Act preclusion, it left important questions unresolved about the reach of Section 2(b) and the meaning of "impairment." More specifically, and contrary to the Sixth Circuit's suggestion, this Court had no occasion in *Humana* to explain when truly material differences in federal and state procedural mechanisms or available remedies would rise to the level of an "interfere[nce] with a State's administrative regime" under the McCarran Act. 525 U.S. at 310.

This case is an ideal vehicle for addressing this question and, in so doing, bringing greater clarity and uniformity to this important area of federal law. In contrast to *Humana*, the federal-state differences in this case – in terms of both procedural mechanisms and available remedies – are substantial.

1. *Procedural Mechanisms.* Michigan law does not recognize a private right of action to challenge an employer's fraudulent denial of workers' compensation benefits. See Pet. 27-28 & n.8 (citing cases). Instead, under Michigan law respondents' remedy in this

connection is "the filing of a petition for a hearing with the Bureau of Workers' Disability Compensation." *Lisecki* v. *Taco Bell Restaurants*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) (per curiam). As explained above, the MWCA sets forth a streamlined administrative system for resolving disputes over workers' compensation benefits that, with respect to non-intentional injuries (as here), is intended to be *exclusive*. Indeed, a bedrock feature of the Michigan system is that it was intended to *replace* judicially enforceable tort-law remedies with administrative procedures and remedies. In this way, Michigan has decided to limit the power of the state courts – and certainly of juries – to sit in judgment on disputes over workers' compensation benefits.

Where, as here, a State has chosen to resolve claims through an administrative process that is meant to replace private civil suits, a federal RICO lawsuit challenging the denial of benefits plainly interferes with, and necessarily weakens, the State's administrative scheme. In effect, a lay jury or federal judge in respondents' RICO suit will be asked to apply federal law to evaluate – and second-guess – the determinations made by workers' compensation magistrates in benefit proceedings. Tellingly, five of the six respondents had claims for benefits *pending before the Workers' Disability Compensation Bureau* at the time they filed their RICO claim. See Pet. App. 36a-37a. In this circumstance, the superimposition of a RICO lawsuit represents a direct federal intrusion into regulatory prerogatives that the McCarran Act reserves to the States.

It was for this reason that the *Humana* Court placed importance on the fact that Nevada *did provide*

a private right of action for insurance fraud claims – under *both* the Nevada Unfair Insurance Practices Act *and* Nevada common law. Here, by contrast, there is an *absence* of a judicially enforceable right of action under state law analogous to the federal suit. Private federal lawsuits in this setting strip the States of their ability to set enforcement priorities through the exercise of prosecutorial discretion and encourage citizens to bypass the state administrative process. This represents a fundamental shift in the nature and quality of insurance regulation, which implicates the core concerns of the McCarran Act.

Moreover, since *Humana*, many courts that have confronted the question whether federal lawsuits "impair" state insurance regimes that do not allow for private rights of action to challenge insurer conduct have disagreed with the position taken by the Sixth Circuit in this case. See, *e.g.*, *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999) (RICO claim preempted by the McCarran Act because Minnesota insurance law allowed only "administrative recourse" and not a private civil action); *In re Managed Care Litigation*, 185 F. Supp.2d 1310, 1321 (S.D. Fla. 2002), 150 F. Supp. 2d 1330, 1340 (S.D. Fla. 2001) (RICO claims barred by the McCarran Act where analogous state insurance regime offered no private right of action); *Wineinger* v. *United Healthcare Ins. Co.*, 2000 WL 1277629, at *7-8 (D. Neb. Feb. 16, 2000) (same). This Court's grant of review in this case would allow clarification of this important subsidiary question and resolve the split created by the Sixth Circuit's flawed decision.

2. *The Remedies.* The *second* important divergence between federal and state law in this case

concerns the expansive remedies that respondents are seeking: treble damages and attorneys' fees. In contrast, the MWCA allows an employee to recover the wrongfully withheld benefits. Beyond that, the MWCA provides only for a daily penalty of $50 after 30 days of delinquency by the employer, with a maximum penalty of $1500. Pet. App. 25a-26a; MICH. COMP. LAWS §§ 418.201-418.205, 418.801(2) (penalties, capped at $1500, for nonpayment of benefits). Because the divergence of remedies here is vastly greater than in *Humana*, this case presents the Court with a valuable opportunity to clarify the circumstances in which remedial differences – alone or in combination with significant procedural differences – can rise to the level of an impairment under the McCarran Act.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, and DR. SAUL MARGULES,

Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MICHIGAN CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Edward M. Welch & Daryl C. Royal, *Worker's Compensation in Michigan: Law & Practice* (5th ed. Supp. 2009) 9, 12

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MICHIGAN CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America and the Michigan Chamber of Commerce respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

The issue presented by the petition for a writ of *certiorari*—whether the McCarran-Ferguson Act precludes disappointed worker's compensation insurance claimants from potentially transforming (and re-litigating) every worker's compensation claim into a civil Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, action—is of profound importance to every employer subject to state worker's compensation laws within the Sixth Circuit. Thousands of *amici curiae*'s members

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[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, and counsel for *amici curiae* timely notified each party's counsel ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

are subject to the court of appeals' ruling, which will impair the exclusive remedy provisions of worker's compensation laws in numerous States and undermine the ability of employers to insure against on-the-job employee injuries. *Amici curiae* are well situated to assist the Court in understanding the enormous practical importance of the McCarran-Ferguson Act and RICO issue that this case presents.

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Organized 50 years ago, the Michigan Chamber of Commerce has become the strongest advocate and voice for business in the State of Michigan. With more than 7,000 member firms, the Michigan Chamber is one of the largest state chambers of commerce in the Nation. The Michigan Chamber operates state and federal political action committees that help keep its members' interests front and center for lawmakers at all levels. Relevant here, the Michigan Chamber was in the forefront of the reform of Michigan's worker's compensation laws in the 1980s.

In the instant case, plaintiffs seek to expand RICO into an area of the law explicitly reserved by Congress for the States. The court of appeals held that a RICO action could be brought against an employer and a claims-handling company for alleged wrongful processing of worker's compensation claims. That decision subverts the purpose and language of the McCarran-Ferguson Act, which broadly precludes application of federal law that would impair state laws, such as worker's compensation laws, that were enacted for the purpose of regulating the business of insurance. The proposed expansion of RICO's civil remedies to dissatisfied worker's compensation claimants must yield to the McCarran-Ferguson Act's reverse preemption.

The effect of this ruling on *amici*'s members, if not reviewed by this Court, will be staggering. States have created worker's compensation schemes throughout the Nation that set aside employees' rights to bring tort actions in exchange for no-fault systems that, through worker's compensation insurance, pay out $50 billion worth in benefits annually to cover employee personal injuries arising out of and in the course of employment.

Amici thus have a strong interest in the Court correctly interpreting the McCarran-Ferguson Act and reversing the decision below so that state law worker's compensation schemes are not overrun by a proliferation of civil RICO actions.

SUMMARY OF ARGUMENT

Congress enacted the McCarran-Ferguson Act to broadly protect state laws enacted for the purpose of regulating the business of insurance from undue federal interference, except where Congress enacted a law specifically relating to the business of insurance. 15 U.S.C. § 1012. State worker's compensation programs are precisely the type of state insurance program Congress sought to shield from burdensome federal intrusion. But by permitting disappointed worker's compensation claimants to re-litigate the handling (including the claims handling) of their worker's compensation claims in civil RICO actions in federal court, the decision below subverts the core purpose underlying worker's compensation laws and opens a potential floodgate of federal lawsuits, including class actions, against *amici*'s members whenever a state worker's compensation agency denies a claim.

A. Worker's compensation replaces the traditional tort system with a form of social insurance whereby employers—such as *amici*'s members—bear the economic costs of injuries—more than $50 billion annually—without regard to fault. Workers need not prove negligence on the part of their employers, nor are traditional affirmative defenses available to employers. In exchange, employers are relieved from the burdens of personal injury suits and ensured that limited, standardized worker's compensation benefits are the exclusive remedies available for workplace injuries.

From inception, worker's compensation schemes have been undergird by insurance, which facilitates the spreading of the risk of workplace injuries. In nearly every State, including Michigan, worker's compensation is funded through a system of private insurance that is regulated by the States.

The ruling below, if left undisturbed, will undermine States' worker's compensation systems by permitting unsatisfied worker's compensation claimants to bring civil RICO actions whenever they contend they have not received all the benefits they believe they are due, something Congress not only never intended but explicitly sought to prevent. Multiplied throughout the Nation, the effect of the Sixth Circuit's rationale will be profound, as over $50 billion of benefits are paid out by state worker's compensation systems annually, with over $5.3 billion of that total originating from States within the Sixth Circuit alone. The prospect of RICO actions by worker's compensation claimants will fundamentally alter how employers and worker's compensation insurance companies must address potential worker's compensation losses and the premiums to insure against those losses.

B. 1. Under the McCarran-Ferguson Act, any state law enacted for the purpose of regulating the business of insurance "reverse preempts" federal law that would invalidate, impair, or supersede that state law. The decision below, concluding that the Michigan

Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws §§ 418.101-418.941, does not regulate the "business of insurance," cannot be reconciled with the precedents of this Court and of the Seventh Circuit.

This Court has described "the core of the 'business of insurance'" as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. National Secs., Inc.*, 393 U.S. 453, 460 (1969). Just like almost every other State where *amici*'s members conduct business, the WDCA regulates the business of insurance by (1) mandating that Michigan employers purchase a worker's compensation insurance policy from an insurance carrier authorized to transact the business of worker's compensation insurance; (2) dictating what coverage the insurance policy must provide and specifying key terms of the policy; and (3) regulating the insurance carrier's claims processing.

It makes no difference to this case that the employer, petitioner Cassens, self-insures rather than purchasing a worker's compensation insurance policy (an arrangement that is common in many worker's compensation systems throughout the Nation). This Court has held that self-insurance plans, by engaging in the same risk pooling arrangements as insurance procured from a third party, constitute the business of insurance. *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003).

2. The ruling below was also wrong in its conclusion that civil RICO actions would not invalidate, impair, or supersede the WDCA. The WDCA, like nearly every other worker's compensation regime, provides the exclusive remedy for workers injured during the course of their employment and provides a specific remedy for the wrongful denial of benefits. RICO actions seeking recovery of worker's compensation benefits as well as treble damages and attorney's fees would frustrate the "exclusive remedy" provisions of worker's compensation laws. Moreover, RICO actions would interfere with the State's administrative regime for adjudicating entitlement to worker's compensation because federal courts would have to determine such entitlement as a threshold matter in the RICO actions.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS CANNOT BE RECONCILED WITH THIS COURT'S MCCARRAN-FERGUSON ACT PRECEDENTS AND WILL HAVE SIGNIFICANT, ADVERSE CONSEQUENCES TO COUNTLESS EMPLOYERS SUBJECT TO WORKER'S COMPENSATION CLAIMS

A. Absent Review By This Court, State Worker's Compensation Systems Will Be Overrun By Civil RICO Lawsuits

1. Congress enacted the McCarran-Ferguson Act "*broadly* to give support to the existing and future state systems for regulating * * * the business of insurance." *SEC v. National Secs., Inc.*, 393 U.S. 453,

458 (1969) (emphasis added) (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946)); *see also* 15 U.S.C. § 1011. To that end, the McCarran-Ferguson Act precludes the application of any federal statute that would "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Worker's compensation statutes are precisely the type of state law that Congress sought to protect with the McCarran-Ferguson Act. Worker's compensation is a no-fault system designed to provide an exclusive remedy to workers for personal injuries arising out of and in the course of their employment. Worker's compensation covers a staggering number of employees; approximately ninety-seven percent of all workers covered by state unemployment programs are also covered by worker's compensation. Terry Thomason *et al.*, *Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements* 6 (2001); *see also* 1 Lex K. Larson, *Larson's Workers' Compensation Law* § 2.08 (2009) (noting that approximately ninety percent of all workers are covered). All told, more than $50 billion in worker's compensation benefits are paid out pursuant to state worker's compensation programs annually. National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs, 2006*, at 19 (Aug. 2008), *available at* http://www.nasi.org/usr_doc/nasi_workers_comp_report_2006.pdf.

Worker's compensation replaces the traditional state law tort system with a form of social insurance. Around the turn of the twentieth century, States concluded that industry, rather than individual workers, should bear the economic costs of workplace injuries. This was a reflection of the fact that "industrial accidents were not only more common, but were almost entirely fortuitous." P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 Kan. J. L. & Pub. Pol'y 279, 279 (2002).

Workers thus were relieved of the difficult obligation of proving negligence on the part of their employers and of defeating three difficult-to-overcome employer defenses at common law: (1) the fellow-servant rule, which precluded employer liability for injuries caused by a fellow worker's negligence; (2) assumption of the risk, whereby the worker assumed the risk of inherent job dangers; and (3) contributory negligence, which barred the employee's recovery if he or she was negligent in any way. *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198-200 (1917); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 776 (1982); Edward M. Welch & Daryl C. Royal, *Worker's Compensation in Michigan: Law & Practice* § 1.2 at 1-3 (5th ed. Supp. 2009). Before worker's compensation, workers prevailed in fewer than twenty percent of suits over industrial

accidents. Larson, *supra*, § 2.05; *see also* Thomason, *supra*, at 5.

Employers, for their part, were freed from the costs and uncertainty of personal injury suits. Worker's compensation benefits were made the exclusive remedy for injured employees, and they were standardized, with a fixed scale of benefits for each type of injury. *See, e.g.*, Keating, *supra*, at 300; Cal. Lab. Code § 3601(a); Mich. Comp. Laws § 418.131; Ind. Code Ann. § 22-3-2-6. Injured workers thus became entitled only to certain wage loss benefits, medical treatment, and rehabilitation services.

2. From worker's compensation's earliest origins, the use of insurance has been at the core of securing the payment of its benefits.[2] *New York Cent. R.R.*, 243 U.S. at 194 (noting that, for one of the first worker's compensation laws upheld against constitutional challenge, "[a] fund is created, known

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[2] The rise of worker's compensation was concomitant with the development of insurance for losses generally. As workers became dependent on wages and steady employment, they sought to protect their families from potential economic misfortune, and "life insurance appeared in England and Scotland [in] the eighteenth century." Keating, *supra*, at 299. "Efforts to begin life insurance companies in America were not successful until the 1840s, but because of the useful service insurance provided by sharing risks, insurance grew rapidly in America and was used to diversify risks of loss other than those of death. Health and accident insurance, liability insurance, and workmen's compensation would all grow to take an important place in the U.S. economy." *Ibid.*

as 'the state insurance fund,' for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided"); *see also* Thomason, *supra*, at 34 ("From its origin (in most states) between 1910 and 1920, workers' compensation has relied on a mixture of state funds, private carriers, and self-insurance * * * ."). By providing predictability and manageability to employers' costs, worker's compensation made the risk associated with workplace injuries "insurable * * * to curtail the delays and expenses of lawsuits." Thomason, *supra*, at 5. Insurance thus facilitates the manner in which the costs of the worker's compensation system are spread across the public at large.

Early debate in the States ensued over whether worker's compensation should be funded through private insurance or through state funds—*e.g.*, state-funded insurance programs. *Id.* at 139. Ultimately, the private insurance industry won the debate in most States. *Ibid.*[3] And as part of the worker's compensation statutory schemes, States regulate worker's compensation insurance to ensure that claims would be properly processed and benefits would be timely paid. *See, e.g.*, Mich. Comp. Laws § 418.801; Fla. Stat. § 440.20; Mass. Gen. Laws ch. 152, § 13.

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[3] Most benefits now are paid by private insurance. *See* National Academy of Social Insurance, *Workers' Compensation*, *supra*, at 13.

Accordingly, some form of insurance is an essential element of every State's worker's compensation system today, and Michigan is no exception. Indeed, in Michigan, every employer subject to worker's compensation is required either to purchase insurance or to obtain approval as a self-insured employer. Mich. Comp. Laws § 418.611. And even those employers that are permitted to self insure are almost always required to purchase excess insurance to cover against significant losses. *Id.* § 418.611(1)(a); Welch, *supra*, § 2.16 ("Almost all self-insured employers purchase specific excess insurance," under which "an insurance company agrees to pay the losses for a specific occurrence if they exceed a certain amount."). Other States are no different. *See, e.g.*, Cal. Lab. Code § 3700; Minn. Stat. § 176.181, subd. 2(a).

3. There can be no dispute that the ruling below will significantly and adversely undermine worker's compensation programs to which *amici*'s members are subject. The court of appeal's decision permits disappointed worker's compensation claimants to bring civil RICO actions whenever they receive fewer benefits than they believe they are due.

In the instant case, plaintiffs are all current or former employees of petitioner "Cassens who have submitted worker's compensation claims to Cassens based on workplace injuries they have each sustained." Pet. App. 3a. These plaintiffs contend that petitioners "deliberately selected and paid unqualified doctors * * * to give fraudulent medical opinions that would support the denial of worker's compensation benefits,

and that [petitioners] ignored other medical evidence in denying them benefits." *Ibid.* Plaintiffs thus seek only the very same benefits they claim were wrongfully withheld (trebled under 18 U.S.C. § 1964(c)) and allege no other independent injury. Accordingly, plaintiffs' civil RICO action is nothing more than an attempt to re-litigate worker's compensation claims that a state agency already denied.

Absent this Court's intervention, the Sixth Circuit's ruling will permit federal courts to sit in review of state agency worker's compensation proceedings—something Congress explicitly sought to preclude, *see* 28 U.S.C. § 1445(c) ("A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."). And federal courts within the Sixth Circuit will be permitted to oversee the payout of the $5.3 billion of worker's compensation benefits disbursed annually in States within the Sixth Circuit by private insurers, state-funded insurance programs, and self insurers. National Academy of Social Insurance, *Workers' Compensation*, *supra*, at 18-19. Under the ruling below, even claimants that have already been *awarded* benefits can claim disappointment and bring civil RICO actions claiming that some alleged fraud prevented them from getting more.

This result, which permits re-litigation of claims, undermines the closed nature of state worker's compensation by providing an alternative avenue for workers to seek relief with the additional availability

of treble damages and attorney's fees. Moreover, such actions could impose unforeseen losses for worker's compensation insurers. This might cause insurers to raise premiums or, if they cannot due to state regulation, to abandon the market altogether. Thomason, *supra*, at 170.

By no means are these concerns inchoate. In the few months that have followed the decision below, civil RICO class actions have already been filed against *amici*'s members. Some of the Nation's most important businesses, such as United Parcel Service, Coca-Cola Enterprises, and DHL, already have been sued or threatened with suit by employees claiming RICO violations based upon wrongfully denied worker's compensation benefits. *See, e.g.*, *Lewis v. Drouillard*, No. 2:09-cv-11059 (E.D. Mich. filed Mar. 30, 2009); *Jackson v. Segwick Claims Mgmt. Servs., Inc.*, No. 2:09-cv-11529 (E.D. Mich. filed Apr. 23, 2009). This is just the beginning. The availability of treble damages and attorney's fees provides significant incentive for other disappointed worker's compensation claimants to bring more RICO class actions against *amici*'s members.

Nor should the Court allow this issue to percolate. This Court will have limited opportunity to review the issues raised by the decision below in the future. While the instant case was filed by individual plaintiffs, every subsequent case that has been filed under this worker's compensation-RICO theory is a putative class action. As the Court has recognized, when RICO cases are certified as class actions, the

threat of class-wide damages, particularly treble damages, creates sometimes insurmountable pressure on businesses to settle out of court rather than face potentially staggering liability, substantial litigation expenses, and the attendant risk of being associated with a federal lawsuit claiming "racketeering." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Although Rule 23(f) of the Federal Rules of Civil Procedure provides a possible avenue to interlocutory review of class certification, such petitions are rarely granted by courts of appeals. Thus, RICO class actions, such as the cases that will follow this one, are rarely litigated to the point that would enable this Court's review, and therefore this Court should address these issues in this case now.

B. The Decision Below Is Wrong And Conflicts With The Decisions Of This Court

In deciding that the McCarran-Ferguson Act does not preempt civil RICO claims for alleged fraud in the processing of worker's compensation benefit claims, the court of appeals struggled with the question whether worker's compensation laws, like the Michigan WDCA, regulate the business of insurance. But that question is not a close one. A straightforward, routine application of this Court's precedents yields the conclusion that the WDCA regulates the business of insurance.

1. The decision below, by narrowly interpreting "business of insurance," conflicts with decisions of this Court and the Seventh Circuit

a. The decision below, although acknowledging that "[t]here are several provisions of the WDCA that directly relate to the terms of the insurance contract and thus to 'the business of insurance,'" Pet. App. 23a, held nonetheless that the WDCA was not enacted for the purpose of regulating the business of insurance. That decision conflicts with precedents of this Court and the Seventh Circuit.

This Court has described "the core of the 'business of insurance'" under the McCarran-Ferguson Act as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *SEC v. National Secs., Inc.*, 393 U.S. 453, 460 (1969). "Statutes aimed at protecting or regulating" the "relationship between the insurance company and the policyholder," "are laws regulating the 'business of insurance.'" *Ibid.*

Determining whether a particular practice is part of the business of insurance is guided by three factors: (1) whether the practice "has the effect of transferring or spreading a policyholder's risk"; (2) whether it is "an integral part of the policy relationship between the insurer and the insured"; and (3) whether the practice "is limited to entities

within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

Even the most straightforward examination of the WDCA demonstrates that all three factors are present. The WDCA, broadly speaking, can be viewed as imposing three key requirements. First, the WDCA mandates Michigan employers to purchase an insurance contract from an insurance carrier that is "authorized to transact the *business of worker's compensation insurance* within this state." Mich. Comp. Laws § 418.611(1)(b) (emphasis added). Alternatively, employers may self-insure only after receiving state authorization upon a showing of ability to pay worker's compensation claims. *Id.* § 418.611(1)(a). Thus, the court of appeals' statement that "[t]here is no contract in the worker's compensation scheme," Pet. App. 19a, is fundamentally wrong. The WDCA—like other state worker's compensation statutes, *see* page 12 *supra*—mandates an insurance contract between employers and insurers to cover employees' workplace injuries.[4]

Second, the WDCA, like other States' statutes, dictates what coverage the worker's compensation

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[4] As the petition discusses, even where the employer self insures, the employer takes on the role of insurance provider, and Michigan law treats worker's compensation coverage as part of the contract between employer and employee. Pet. 14 (collecting cases). More significantly, even employers that self insure are often required to have excess insurance policies. *See* Mich. Comp. Laws § 418.611(1)(a).

insurance policy must provide. *See, e.g.*, Fla. Stat. §§ 440.09, 440.12, 440.14-440.16; Mo. Rev. Stat. §§ 287.110, 287.130-287.250, 287.300, 287.310. It specifies which employees must be covered by the policy. *See* Mich. Comp. Laws § 418.161. It spells out exactly what claims the insurance policy must pay: employees' "personal injur[ies] arising out of and in the course of employment by an employer who is subject to this act." *Id.* § 418.301(1). And it determines the type and amount of insurance benefits that the policy must pay for each claim. *See, e.g.*, *id.* § 418.301(5) (computation of disability benefits); *id.* § 418.321 (compensation for death resulting from personal injury). Thus, the WDCA prescribes nearly all the key terms of the insurance contract between the employer and carrier.

In fact, as the court of appeals recognized, Pet. App. 23a, the WDCA dictates actual policy language that must appear in "each policy of insurance covering worker's compensation in this state." *Id.* § 418.621(4). Every such policy must contain provisions titled "Compensation," "Medical services," "Rehabilitation services," "Funeral expenses," "Scope of contract," "Obligations assumed," "Termination notice," and "Conflicting provisions," and the text that must appear in each policy under these headings is also provided. *Ibid.*

And third, the WDCA regulates the insurance company's claims processing. It requires employees to give notice of a workplace injury within ninety days and to file a claim within two years. *Id.* § 418.381(1).

And it mandates that the insurance carrier pay benefits within fourteen days after receiving notice of an injury (absent a dispute), imposes penalties for late payment, and requires recordkeeping of payments made. *Id.* § 418.801. The WDCA also provides for a process to resolve disputes over claims, either through mediation or through adjudication by the Michigan Workers' Compensation Agency. *Id.* § 418.847. Other States impose similar requirements. *See, e.g.*, Cal. Lab. Code § 5300; Ohio Rev. Code Ann. § 4123.51.

This Court has held that such state regulation of insurance coverage goes to the core of the business of insurance. By mandating coverage and provisions of worker's compensation insurance policies, the WDCA "prescrib[es] the terms of the insurance contract," and "directly regulate[s] the 'business of insurance.'" *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 502-503 (1993). *See also UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 374-375 (1999) (state law mandating insurance contract terms regulates business of insurance); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-743 (1985) (mandated-benefit laws regulate the business of insurance). And by regulating the processing of worker's compensation claims, the WDCA regulates "the actual performance of an insurance contract," which this Court has held "falls within the 'business of insurance.'" *Fabe*, 508 U.S. at 503.

b. The decision below held that worker's compensation regimes *per se* do not regulate the

business of insurance (even where the employer purchases an insurance policy rather than self-insures). Pet. App. 19a-22a. But that cannot be reconciled with the Seventh Circuit's decision in *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998). The court in that case examined a very similar scheme in the Black Lung Benefits Act (BLBA) and held that the BLBA specifically relates to the "business of insurance."[5] Like the WDCA, the BLBA mandates the purchase of worker's compensation insurance policies; the BLBA requires coal mine operators in certain States to either purchase a worker's compensation insurance policy or demonstrate their ability to self insure. *Id.* at 319-320; 30 U.S.C. § 933(a). Also like the WDCA, the BLBA dictates certain coverage and terms that must be provided in the insurance policies. 30 U.S.C. § 933(b). Applying the three McCarran-Ferguson factors, the *Lovilia Coal* court concluded that the BLBA specifically relates to the business of insurance because (1) it spreads the coal mine operators' risk of paying black lung claims among all coal mine policyholders; (2) it is an integral part of the policy relationship between employer and carrier, specifically directing carriers

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[5] The issue in *Lovilia Coal* was whether the federal BLBA came within the McCarran-Ferguson Act's exemption from "reverse preemption" as an act of Congress that specifically relates to the business of insurance. The three *Pireno* factors for determining whether a law regulates the "business of insurance" apply equally in this context. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

how to structure their contracts; and (3) it is aimed solely at insurance policyholders and carriers.

c. The court below offered an alternative basis for its decision: that self-insurance is not the business of insurance. But that holding also is in direct conflict with this Court's precedent.

This Court has directly addressed the question whether self-insurance constitutes insurance. In the context of ERISA's savings clause, which saves from preemption state law "which regulates insurance," 29 U.S.C. § 1144(b)(2)(A), this Court has held that the clause applies to both self-insured and insured ERISA plans, because "self-insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 54, 60-61 (1990) (holding that state law regulating self-insured plan falls within ERISA's insurance savings clause).

The decision below equates being self-insured with being uninsured. But that is wrong. An employer can self-insure only after demonstrating the financial wherewithal to pay worker's compensation insurance benefits, just as insurance carriers must demonstrate ability to pay to be authorized as a worker's compensation insurance provider. And a self-insured employer is subject to the same insurance regulations that apply to insurance carriers. Moreover, it is illogical to think that Congress, in enacting the

McCarran-Ferguson Act, would have wanted to preserve States' ability to regulate insurance carriers but not preserve their ability to regulate employers who take on the role of insurer by self-insuring.

2. The Sixth Circuit's ruling that civil RICO actions do not impair state law under the McCarran-Ferguson Act is wrong

The decision below also was wrong in its conclusion that civil RICO actions would not invalidate, impair, or supersede the WDCA. Civil RICO actions would provide treble damages and attorney's fees for the wrongful denial of worker's compensation benefits. That would impair the WDCA's "exclusive remedy" provisions in Michigan, *see* Mich. Comp. Laws § 418.131, and almost every other state, *see, e.g.*, Cal. Lab. Code § 3601; Ind. Code Ann. § 22-3-2-6, which preclude employees' recovery of damages under other law for an injury that is covered under worker's compensation. Accordingly, civil RICO actions in cases alleging wrongful denial of worker's compensation benefits are barred under the McCarran-Ferguson Act.

The McCarran-Ferguson Act does not give "a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Humana Inc. v. Forsyth*, 525 U.S. 299, 309 (1999). Instead, a federal law that would "frustrate any declared state policy or interfere with a State's administrative regime" is held to "impair" the

state regulation and is precluded. *Id.* at 310. Civil RICO actions for the wrongful denial of worker's compensation benefits do both.

As the Sixth Circuit recognized, Pet. App. 25a-26a, the WDCA provides remedies for the wrongful denial of worker's compensation benefits. Any insurance carrier that "repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable" is subject to having its license revoked, Mich. Comp. Laws § 418.631(1), and any self-insured employer that does so is subject to losing its self-insured status, *id.* § 418.631(2). And the WDCA imposes a penalty of fifty dollars per day for each day over thirty that benefits are unpaid after they become due. *Id.* § 418.801(2). Relying on *Humana*, the decision below held that those remedy provisions of the WDCA are not impaired by the additional remedies provided under RICO.

But the court of appeals went astray by not even considering whether RICO would impair the WDCA's "exclusive remedy" provision. That provision specifies that with the exception of intentional torts, "[t]he right to the recovery of benefits" under the WDCA is "the employee's exclusive remedy against the employer for a personal injury or occupational disease." Mich. Comp. Laws § 418.131(1). The provision ensures the Michigan Legislature's guarantee that employers be protected from tort liability in exchange for a no-fault obligation to pay benefits for workplace injuries. *Clark v. United Techs. Automotive, Inc.*, 594 N.W.2d 447, 450 (Mich. 1999). The statute provides

employers "immunity" from suit. *Harris v. Vernier*, 617 N.W.2d 764, 768-769 (Mich. Ct. App. 2000). If a suit is based upon an injury covered by the WDCA—*viz.*, a personal injury arising out of and in the course of employment—it is barred by the exclusive-remedy provision. *Cole v. Dow Chem. Co.*, 315 N.W.2d 565, 568-569 (Mich. App. 1982).

Respondents' RICO action seeks recovery of the very same worker's compensation benefits that they claim to be entitled to under the WDCA, but with those benefits trebled and with the additional remedy of attorney's fees. But that would "frustrate [the] declared state policy," *Humana*, 525 U.S. at 310, that WDCA's benefits be the respondents' "exclusive remedy," Mich. Comp. Laws § 418.131(1).

Moreover, civil RICO lawsuits would "interfere with [the] State's administrative regime," *Humana*, 525 U.S. at 310, that was established to adjudicate employees' eligibility for worker's compensation benefits. The Michigan Legislature placed the adjudication of entitlement to WDCA benefits exclusively within the purview of the Michigan Workers' Compensation Agency. Mich. Comp. Laws § 418.841(1); *Harris*, 617 N.W.2d at 772. Indeed, Michigan state courts lack subject-matter jurisdiction to hear claims for benefits with regard to workplace injuries. *Harris*, 617 N.W.2d at 770-772. Permitting RICO claims for wrongful denial of worker's compensation benefits in federal court would interfere with Michigan's administrative regime because federal judges and juries would have to determine as

a threshold matter whether the employee was entitled to benefits under WDCA, a matter exclusively within the jurisdiction of the Michigan Workers' Compensation Agency.

The court of appeals' reasoning is not in any way limited to Michigan's worker's compensation scheme. Most States' regimes have provisions making their remedies exclusive and requiring adjudication of disputes in an administrative agency rather than in the courts. Permitting RICO treble damages and attorney's fees would impair the operation of those state worker's compensation schemes in violation of the McCarran-Ferguson Act.

* * *

In the instant case, application of civil RICO to worker's compensation claims will have significant adverse consequences to worker's compensation schemes throughout the Nation. To protect against these consequences, this Court must ensure that RICO's use is stringently analyzed where, as here, Congress has made clear that its purpose, as it was in enacting the McCarran-Ferguson Act, "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins.*, 328 U.S. at 429.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 8, 2009

MOTION FILED

JUN 1 - 2009

No. 08-1375

In The Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

GARY BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion for Leave to File an *Amicus Curiae* Brief Supporting Petitioners

Amicus Curiae Brief of MI Self-Insurers Assoc Supporting Petitioners

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF SUPPORTING PETITIONERS

The Michigan Self-Insurers' Association asks the Court for leave to file an *amicus curiae* brief supporting the petitioners.

Counsel of record for the petitioners and respondents have received notice that the Association intends to file an *amicus curiae* brief supporting the petitioners on (Tuesday) May 26, 2009, which was more than ten days before the last day for filing the *amicus curiae* brief, (Monday) June 8, 2009.

Counsel of record for the petitioners consented to the filing of an *amicus curiae* brief by the Association. Counsel of record for the respondents withheld consent.

The Association is interested because all of its two hundred (plus) members are either a Michigan employer or a defined group of Michigan employers that has been approved by the director of the Michigan Workers' Compensation Agency to provide itself with insurance for Michigan workers' compensation under a Michigan statute, MICH. COMP. LAWS § 418.611(1)(a), just as petitioner Cassens Transport. All administer the insurance for Michigan workers' compensation by exercising the right to choose a doctor to examine an employee who claims benefits that a Michigan statute describes, MICH. COMP. LAWS § 418.385, just as petitioner Cassens Transport. The exegesis by the Court of Appeals that this is not insurance within the federal statute, McCarran-Ferguson Act, 15 U.S.C. § 1012(b), negatives these two Michigan statutes.

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INTEREST OF THE *AMICUS CURIAE*

All of the two hundred (plus) members of the Michigan Self-Insurers' Association have been approved to self-insure the liability for workers' compensation by the director of the Michigan Workers' Compensation Agency under MICH. COMP. LAWS § 418.611(1)(a) and administer claims by selecting a doctor to examine claimants under MICH. COMP. LAWS § 418.385 just as petitioner Cassens Transport.[1]

---

[1] No counsel for a party authored any part of this *amicus curiae* brief.

No one other than *amicus curiae* MI Self-Insurers' Assoc made a monetary contribution to this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

The Michigan Court of Appeals has authoritatively ruled that there is insurance when the director of the Michigan Workers' Compensation Agency approves an employer to self-insure the liability for workers' compensation under MICH. COMP. LAWS § 418.611(1)(a).

ARGUMENT

I. THERE IS INSURANCE WHEN THE DIRECTOR OF THE MICHIGAN WORKERS' COMPENSATION AGENCY APPROVES AN EMPLOYER TO SELF-INSURE ITS LIABILITY FOR WORKERS' COMPENSATION.

The director of the Michigan Workers' Compensation Agency can approve an employer to self-insure the liability for workers' compensation. MICH. COMP. LAWS § 418.611(1)(a). ("Each employer under this act, subject to the approval of the director [of the Michigan Workers' Compensation Agency] shall secure the payment of compensation under this act by either of the following methods: (a) By receiving authorization from the director to be a self-insurer.") The Michigan Court of Appeals has established that this is insurance. *Heinz v. Chicago Rd Investment Co*, 549 N.W.2d 47, 54 (1996). (". . . self-insurance in the worker's compensation arena is the functional equivalent of purchasing a commercial insurance policy.") This was nothing new. *Id*. ("This Court has previously refused to distinguish between self-insurance and purchasing insurance from a worker's compensation insurer, and we refrain from doing so

now. See *Wallace v Consolidated Freightways*, 199 Mich App 141, 145; 500 NW2d 752 (1993).")

The decision by the Michigan Court of Appeals has the same authority as a decision by the Michigan Supreme Court because it is binding precedent under the rule of stare decisis having been published. MICH. COURT RULE 7.215(C)(2). ("A published opinion of the [Michigan] Court of Appeals has precedential effect under the rule of stare decisis.") Just as a ruling by the Michigan Supreme Court, the ruling by the Michigan Court of Appeals is binding authority until overruled by the Michigan Supreme Court. *Id.* ("The filing of an application for leave to appeal to the [Michigan] Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the [Michigan Court of Appeals].") *Heinz*, *supra*, has not been overruled or even questioned. It has been followed. *Rodriguez v. ASE Ind., Inc.*, 738 N.W.2d 238 (2007).

The decision by the Court of Appeals that there is no insurance when the director approves an employer to self-insure the liability for workers' compensation under MICH. COMP. LAWS § 418.611(1)(a) is in direct and irreconcilable conflict with *Heinz*. Employers and administrators in Michigan such as the director of the Michigan Workers' Compensation Agency and the commissioner of Insurance alike will have to guess whether a Michigan employer who has been duly approved to self-insure its liability for compensation does or does not actually have insurance.

The confusion will be widespread. There are about 600 employers who have been approved by the director to self-insure the liability for compensation.

And these account for nearly half of all compensation benefits that are paid to Michigan employees because the self-insurers include some of the largest employers in Michigan such as General Motors, Chrysler, Ford Motor, AT&T, DTE Energy, and Consumers Energy and nearly all counties and public universities such as the University of Michigan. Institute for Continuing Legal Education, *Michigan Insurance Law and Practice* (2009 Supp), § 13.23, 13-15.

The confusion may end self-insurance for workers' compensation in Michigan. No employer can sensibly continue to self-insure under MICH. COMP. LAWS § 418.611(1)(a) when that may not be insurance under McCarran-Ferguson, 15 U.S.C. § 1012(b) to preclude an employee suing under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* but just buying compensation insurance from an insurance company decidedly fulfills both. Buying a policy of insurance fulfills the state law, MICH. COMP. LAWS § 418.611(1)(b) ("Each employer under this act, subject to the approval of the director, shall secure the payment of compensation by either of the following methods: (b) By insuring against liability with an insurer authorized to transact the business of worker's compensation insurance [in Michigan]") and also the federal law, 15 U.S.C. § 1012(b), to bar a lawsuit under RICO. The increased cost to buy compensation insurance pales before the cost of defending a lawsuit under RICO and leaves self-insurance estranged from Michigan compensation law.

CONCLUSION

The portion for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CASSENS TRANSPORT CO., ET AL.,
Petitioners,

v.

PAUL BROWN, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR MICHIGAN DEFENSE TRIAL COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

The McCarran-Ferguson Act reverse preempts federal statutes that "impair . . . any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). A federal statute, such as RICO, "impair[s]" a state law if it "interfere[s] with a State's administrative regime." *Humana Inc. v. Forsyth*, 525 U.S. 299, 310 (1999).

Michigan's Workers' Disability Compensation Act ("WDCA"), MICH. COMP. LAWS § 418.101 *et seq.*, like workers' compensation laws in every other state, creates an administrative regime that transfers the financial risk of workplace injuries from the employee to the employer. This Court has both expressly recognized this risk-transferring effect by describing workers' compensation as "a compulsory insurance system" and acknowledged that employers who self-insure in the workers' compensation context are "insurers." Additionally, this Court has stated that "the rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws."

1. Do workers' compensation laws, which create "a compulsory insurance system," regulate the business of insurance?

2. Does providing treble damages for RICO claims interfere with a state workers' compensation system specifically designed to be the exclusive remedy for workers' compensation claims?

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BRIEF FOR THE MICHIGAN DEFENSE TRIAL COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Amicus curiae Michigan Defense Trial Counsel respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICUS CURIAE*

The Michigan Defense Trial Counsel ("MDTC") is a business association organized and existing to advance the knowledge and improve the skills of defense lawyers, to support improvements in the adversary system of jurisprudence, and to address the interests of the legal community in Michigan. MDTC appears before this Court and Michigan courts as a representative of defense lawyers and their clients in Michigan, many of whom are affected by the issues in this case.

STATEMENT

This case presents a question of exceptional importance that involves the interpretation of two important federal statutes, the McCarran-Ferguson Act and the RICO Act, and affects millions of workers and hundreds of thousands of employers in the Sixth

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the MDTC, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. All parties were timely notified, in accordance with Rule 37.2, of MDTC's intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

Circuit. After the Sixth Circuit's decision, state workers' compensation laws no longer provide the exclusive remedy for workplace injuries. Instead, RICO claims can now be combined with workers' compensation claims, tripling the amount of liability exposure for employers. This expansion of the remedies available for disputes arising from workplace injuries undermines the very reason that States, including Michigan, adopted the compulsory insurance regime known as workers' compensation: to create an exclusive, administrative remedy for workplace injuries that both eliminates litigation and guarantees that employees will recover predetermined amounts.

1. Before 1910, state common-law rules governed employee attempts to recover from employers for workplace injuries. "Under these laws an injured worker's only recourse was through the courts and his chances of recovery were slight." NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 11 (1973) (hereinafter "COMPENDIUM"). According to some estimates, "not more than 15 percent of injured employees ever recovered under the common law, even though 70 percent of [workplace] injuries were estimated to have been related to working conditions or employer's negligence." *Id.* This low rate of recovery for employees stemmed from a number of factors: the standard of care for employers was low, "extend[ing] only to proper diligence"; "fellow workers . . . were reluctant to testify against the employer"; the employer benefited from a number of defenses, including contributory negligence, the fellow-servant rule, and assumption of risk; and "the expense of litigation" was an obstacle to employees. *Id.* at 12. On the other side of the equation, employers faced the risk of "pay[ing] out large sums of money for defense

of these claims and for satisfaction of verdicts." *Id.* at 14.

Between 1911 (when Wisconsin passed its workers' compensation act) and 1948 (when Mississippi did), each of the states and the territories of Alaska and Hawaii enacted workers' compensation regimes to address these problems arising from the common-law approach. COMPENDIUM at 18; *see also Anderson v. Hawaiian Dredging Co.*, 24 Haw. 97 (1917) (noting that the territory enacted workers' compensation in 1915); *Haman v. Allied Concrete Prods., Inc.*, 495 P.2d 531, 533 (Alaska 1972) (same). These regimes specifically sought to "reduce court delays, costs and workloads arising out of personal injury litigation" and to "[e]liminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals." U.S. CHAMBER OF COMMERCE, 2008 ANALYSIS OF WORKERS' COMPENSATION LAWS 6 (2008) (hereinafter "CHAMBER OF COMMERCE ANALYSIS"). In addition to alleviating these litigation costs, state workers' compensation regimes were designed to make workers' compensation "the *exclusive remedy* of employees against employers, with the effect that injured employees ordinarily lost the right to seek a higher tort liability award than their compensation benefits." COMPENDIUM at 23 (emphasis added). Indeed, "'[workers' compensation] relieves the employer not only of common-law tort liability, but also of statutory liability under virtually all state statutes, as well as of liability in contract and in admiralty, for an injury covered by the compensation act.'" *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 663 (2006) (quoting 6 A. LARSON & L. LARSON, WORKER'S COMPENSATION LAW § 100.03[1], at 100–11).

The enactment of workers' compensation shifted the risk of lost wages and medical expenses from the employee to the employer. It acts as compulsory insurance and has precisely the same effect as if the employee, in the absence of workers' compensation, purchased an individual insurance policy with the employer as its insurer. In a free-market system, "workers might be persuaded to accept a wage increment equal to the premium for an individual insurance policy" that would cover on-the-job injuries. COMPENDIUM at 23. "In practice, however, many workers will prefer current consumption over protection and will demand the risk premium in cash." *Id.* "Workmen's compensation makes protection compulsory and substitutes the power of the State for the market system." *Id.*; *see also Richardson v. Belcher*, 404 U.S. 78, 83–84 (1971) ("The original purpose of state workmen's compensation laws was to satisfy a need inadequately met by private insurance or tort claim awards."). Workers' compensation protects against the loss of wages and is complemented by other insurance benefits, including temporary disability insurance, accidental death and dismemberment insurance, and group life insurance. COMPENDIUM at 41. As in other states, Michigan's WDCA provides that the Act is the "exclusive" means by which an employee may recover benefits from an employer for personal injury. MICH. COMP. LAWS §§ 418.131, 418.841(a) .

2. The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). To determine whether a practice, such as the provision of workers' compensation benefits, constitutes the "business of insurance,"

this Court looks to three factors: "'*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'" *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 339 (2003) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)). A federal statute would "impair" a state law if it "interfere[s] with a State's administrative regime." *Humana Inc. v. Forsyth*, 525 U.S. 299, 310 (1999).

3. This case arises from workers' compensation claims filed by six current or former employees of Cassens Transport Company. Pet. App. 3a. The plaintiffs allege that Cassens, as well as Crawford & Company (Cassens' claims adjuster) and certain doctors, engaged in a pattern of racketeering activity designed to deny the plaintiffs' workers' compensation claims. *Id.* According to the plaintiffs, Cassens and Crawford improperly denied workers' compensation benefits both by deliberately selecting and paying unqualified doctors to give fraudulent medical opinions that would support the denial of workers' compensation benefits, and by ignoring legitimate medical evidence of their injuries. *Id.* Despite the Michigan WDCA's exclusive remedy, the plaintiffs challenged the denial of their workers' compensation claims as violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1691(1)(B), 1962(c), & 1964(c). Relying on the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), Cassens and Crawford moved for dismissal on the ground that the Michigan WDCA reverse-preempted the RICO claims.

The district court agreed, reasoning that Michigan enacted the WDCA for the purpose of regulating the business of insurance. Pet. App. 58a. First, the WDCA governs a practice that "transfers or spreads a risk"—namely the risk of incurring costs associated with work-related injuries—"that is characteristic of insurance." *Id.* at 59a. Second, "if one were to define the employee as the insured and the self-insured employer as the insurer," then providing workers' compensation benefits under the WDCA would be "an integral part of the policy relationship." *Id.* And third, workers' compensation is limited to entities in the insurance industry, as adjusters of insurance claims (like Crawford, which administers Cassens' workers' compensation benefits), beneficiaries (*i.e.*, employees), and self-insuring employers that "stand[] in the stead of an insurance company" (like Cassens) are all entities within the insurance industry. *Id.* at 59a–60a. The district court further recognized the common sense point that allowing RICO claims "affording treble damages and a private right of action" would "impair" Michigan's workers' compensation regime by "turn[ing] on its head the policy balance that the Michigan legislature struck" when it enacted its workers' compensation regime. *Id.* at 63a.

The Sixth Circuit reversed. The court concluded that workers' compensation benefits, despite their "insurance-like impression," "are not insurance" because "[t]here is no contract in the workers' compensation scheme." Pet. App. 19a. Workers' compensation "merely creates a legislative remedy . . ., not an insurance contract." *Id.* at 20a. The Sixth Circuit asserted that without a contract, a "policyholder's risk" is not spread or transferred and there is no policy relationship to consider. *Id.* Furthermore, because the WDCA applies to almost all Michigan em-

ployers and employees and because "self-insurance does not relate to the 'business of insurance,'" the court concluded the WDCA is not limited to entities in the insurance industry. *Id.* at 21a, 24a. While recognizing that the WDCA "mak[es] workers' compensation the exclusive remedy except in cases of intentional torts," *id.* at 22a, the court also concluded that RICO remedies for treble damages would not impair the workers' compensation regime. The Sixth Circuit reached this conclusion relying on *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), where "the availability of punitive damages under state law *greater than* the treble damages available under RICO supported the conclusion that RICO did not impair the state law." Pet. App. 26a (emphasis added). The court also asserted that "because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance." *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the Sixth Circuit rewrites the bargain of workers' compensation that has been operating in Michigan and other states for approximately a century. The decision changes the states' insurance regimes for dealing with workplace injuries from one of limited remedies that must be sought exclusively through the workers' compensation system to one in which employees can first recover guaranteed compensation benefits and then seek treble damages and attorney fees in court. In the course of imposing this change, the Sixth Circuit reached conclusions that directly conflict with a number of this Court's decisions as to what insurance is. Although this Court has repeatedly recognized that workers' compensation is a form of insurance—including describing workers' compensation as

"a compulsory insurance system," *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 44 (1999)—and has, since 1917, acknowledged the risk-transferring effect of workers' compensation, the Sixth Circuit somehow concluded that "workers' compensation benefits are not insurance." Pet. App. 19a. The court of appeals also concluded that self-insurance is not insurance, despite the fact that this Court has twice expressly recognized—including once in the context of workers' compensation—that self-insurers are indeed insurers. Having concluded that workers' compensation and self-insurance are not insurance and so do not fall within insurance for the purposes of McCarran-Ferguson, the Sixth Circuit also concluded that transforming what would qualify as a "hermetically sealed" regime, *see Humana*, 525 U.S. at 312, into one subject to RICO remedies would not "impair" that regime or "interfere with" it.

The consequences of the Sixth Circuit's decision are startling and severe. The 13.6 million employees in the four states of the Sixth Circuit can now sue their employers under RICO, claiming treble damages and attorney fees if they are denied workers' compensation benefits, even though they cannot sue their employer in court to obtain the workers' compensation benefits. This dramatic expansion of employer liability divests employers in the Sixth Circuit of their side of the workers' compensation bargain by depriving them of the orderly resolution of workers' compensation issues through an administrative law process and of the avoidance of costly litigation. The increase in premiums that will result from the Sixth Circuit's decision will redound to the detriment of employees in diminished wages and layoffs. Even if the opinion below were construed to apply only to self-insurers, it would interfere with state regimes by

driving self-insurance out of the market, as employers would choose to pay additional insurance costs rather than to face exposure to RICO's remedies.

I. THE SIXTH CIRCUIT'S DECISION CONTRAVENES MULTIPLE DECISIONS OF THIS COURT, INCLUDING *AMERICAN MANUFACTURERS* AND *HUMANA*

The Sixth Circuit's formalistic approach to determining whether a practice is insurance and its analysis of whether a federal statute would interfere with a State's administrative regime ignores the fundamental aspects of workers' compensation. The result it reached conflicts directly with this Court's decisions, including *American Manufacturers* and *Humana*.

A. The Decision Below Conflicts With This Court's Decisions Recognizing Workers' Compensation And Self-Insurance As Forms Of Insurance

The Sixth Circuit's opinion rests on the premises that neither workers' compensation in general nor self-insurance in particular qualify as insurance under the McCarran-Ferguson Act. Pet. App. 19a, 24a, & 26a. Relying on a formalistic view of the term "insurance," the court of appeals concluded that the only type of risk-spreading relationship that qualifies as insurance for the purposes of McCarran-Ferguson is that documented in a formal, written contract of insurance. This conclusion conflicts with at least five of this Court's decisions.

In *American Manufacturers*, this Court described workers' compensation as "a compulsory insurance system": "In the early 20th century, States began to replace the common-law system . . . with a *compul-*

sory insurance system requiring employers to compensate employees for work-related injuries without regard to fault." *Id.* at 44 (emphasis added). Under this system, all employers must either obtain workers' compensation insurance from a private insurer or *act as the insurer themselves* by seeking permission from the relevant State to self-insure. *Id.* In fact, in *American Manufacturers*, this Court specifically explained that "[s]elf-insured employers and private insurers face identical obligations under Pennsylvania's workers' compensation system, and we therefore refer to them collectively as 'insurers' or 'private insurers.'" *Id.* at 44 n.1. In other words, this Court recognized that the self-insured employer is an insurer even though there is no formal contract of insurance.

More recently, in *Howard Delivery Service, Inc. v. Zurich American Insurance Co.*, 547 U.S. 651 (2006), this Court, while describing "the essential character of workers' compensation regimes," *id.* at 662, used the term "insurance" in a way interchangeable with the regimes themselves: "Workers' compensation *insurance* . . . directly benefits insured employers by eliminating their tort liability for workplace accidents." *Id.* at 663 n.6 (emphasis added). It is not insurance policies taken out by employers with insurance companies, of course, that eliminated tort liability; rather it was the passage of workers' compensation laws that eliminated employers' tort liability by turning employers into the insurers of their employees. *See id.* at 662 ("Workers' compensation prescriptions . . . modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents."). Rather than focusing on the lack of a negotiated contract, this Court acknowledged the risk-transferring effect

of the "'classic social trade-off'" of workers' compensation: the employee gives up the "'right to recover full tort damages, including damages for pain and suffering, in cases in which there is fault on the employer's part'" in exchange for "'the right to receive certain limited benefits regardless of fault'." *Id.* at 662–63 (quoting P. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 9 (1998)).

This understanding that workers' compensation has the effect of transferring or spreading an employee's risk is not a new development in this Court's jurisprudence. In 1917, just a few years after workers' compensation laws began to proliferate, this Court recognized that the essence of workers' compensation is that it transfers risk from the individual employee to the employer: "[I]nstead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his dependents"—the employer must "bear the charge." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 203–04 (1917). Just as under an insurance policy with a policy limit, "[i]nstead of [the employee] assuming the entire consequences of all ordinary risks of the occupation," the employee assumes only "the consequences[] in excess of the scheduled compensation," and the employer assumes a "fixed responsibility." *Id.* at 201–02.

In cases involving other mechanisms for spreading risk, this Court has also focused on the substance of the relationship that transfers the risk, not on the existence of a formal insurance contract with an insurance company. In *Kentucky Association of Health Plans v. Miller*, 538 U.S. 329 (2003), this Court rejected the contention that a self-insured health plan was not insurance, because "self-insured plans engage in the same sort of risk pooling ar-

rangements as separate entities that provide insurance to an employee benefit plan." *Id.* at 336 n.1. While *Kentucky Association* focused on the savings clause of ERISA—which applies to "law[s] . . . which regulate insurance," 29 U.S.C. § 1144(b)(2)(A)—rather than on the McCarran-Ferguson Act, it interpreted the same word, "insurance," found in both statutes and expressly concluded that self-insurance is functionally the same as insurance. 538 U.S. at 336 n.1. Similarly, in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), this Court concluded that there was "no serious question" that an HMO is an insurer. *Id.* at 367. An HMO both "provides health care" and acts as an insurer, and to ignore the "insurance element" "would ignore the whole purpose of the HMO-style of organization." *Id.*

Despite all this, the Sixth Circuit stated that the "insurance-like impression" of workers' compensation "is solely a matter of appearance." Pet. App. 19a. But the only reason the court of appeals offered to support this conclusion was the fact that Petitioner does not have a formal contract of insurance with its employees. The court of appeal's analysis of the first two "business of insurance" factors—whether a practice (1) has the effect of transferring or spreading a policyholder's risk and (2) is an integral part of the policy relationship—boils down to the sole fact that "there is no contractual insurance relationship and thus no policyholder." *Id.* at 20a. It is clear, though, under *American Manufacturers*, *Howard Delivery*, *White*, and *Rush Prudential*, that workers' compensation is a form of insurance, even without a formal contract of insurance. To conclude otherwise would "ignore the whole purpose" of workers' compensation. *See Rush Prudential*, 536 U.S. at 367. Under a workers' compensation regime, the employer—like

the HMO in *Rush Prudential*—plays two roles, and one of those roles is that of insurer. And it is equally clear under *American Manufacturers* and *Kentucky Association* that self-insurance is a form of insurance. *See also* 1A COUCH ON INSURANCE § 10:1–10 (addressing self-insurance).

Attempting to bolster its conclusion, the Sixth Circuit also argued that "the employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and worker[s'] compensation merely creates a legislative remedy regarding the tort-liability relationship between employees and employers, not an insurance contract." Pet. App. 20a. The court of appeals' analysis is wrong. In the absence of the statutory workers' compensation insurance scheme, employers owe no duty to compensate employees for workplace injuries unless the injured worker can prove that the employer was at fault for the worker's injury. At the time the statute was enacted, employees were able to prove fault in less than 15% of all cases. COMPENDIUM at 11. Thus, even under the Sixth Circuit's reasoning, in the vast majority of cases an employer *is* akin to an insurer because the employer owed no preexisting duty under the common law to compensate injured workers.

B. The Sixth Circuit's Approach To Analyzing Whether RICO Remedies "Impair" State Law Cannot Be Reconciled With *Humana*

Although the Sixth Circuit specifically noted that Michigan had made "worker[s'] compensation the exclusive remedy except in cases of intentional torts," Pet. App. 22a, it nonetheless concluded that RICO's treble damages and attorney fees would not impair

Michigan's workers' compensation act. In other words, the court reached the incredible conclusion that transforming a state insurance regime from one based on limited, exclusive administrative remedies to one under which treble damages may be sought, in court, did not "interfere with" that insurance regime.

Under the McCarran-Ferguson Act, a federal law is reverse-preempted if it would "invalidate, impair, or supersede" a state law enacted for the purpose of regulating the business of insurance. 15 U.S.C. § 1012(b). In *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), this Court interpreted the word "impair" to include instances when application of the federal law would "frustrate any declared state policy or interfere with a State's administrative regime." *Id.* at 310. In *Humana*, this Court concluded that RICO would complement, not impair, Nevada law governing insurance, because Nevada law already provided a number of other remedies, including "both statutory and common-law remedies to check insurance fraud," private rights of action, and punitive damages capable of "exceeding the treble damages available under RICO." *Id.* at 311–13. This Court specifically noted that the Nevada statute was "not hermetically sealed" and did not "exclude application of other state laws, statutory or decisional." *Id.* at 312.

But workers' compensation laws are markedly different. Most important, workers' compensation laws are specifically designed to be the *exclusive* remedy for workplace injuries. In the words of this Court, "the right of recovery granted groups of workers covered by such compensation laws is exclusive" and the "rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws." *United States v. Demko*, 385

U.S. 149, 151 (1966) (holding that remedies under a federal workmen's compensation statute were the exclusive remedy). *Accord, e.g.*, *Howard Delivery*, 547 U.S. at 663 ("[Workers' compensation] relieves the employer not only of common-law tort liability, but also of statutory liability under virtually all state statutes, as well as liability in contract and in admiralty, for an injury covered by the compensation act." (quoting 6 LARSON & LARSON, § 100.03[1], at 100-11)); *American Manufacturers*, 526 U.S. at 44 ("Following [the] model [adopted by States in the early 20th century], Pennsylvania's Worker's Compensation Act . . . makes employers' liability under this system 'exclusive . . . of any and all other liability.'" (quoting 77 PA. STAT. ANN. § 481(a)); *White*, 243 U.S. at 248 (stating, while describing New York's workers' compensation regime, that "the prescribed liability is made exclusive"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 641 (1990) ("Florida law provides that its workers' compensation remedy 'shall be exclusive and in place of all other liability of such employer to . . . the employee'"). Indeed, exclusivity is the defining feature of workers' compensation regimes. *See* CHAMBER OF COMMERCE ANALYSIS at 6 (a "basic objective[]" underlying workers' compensation laws is to provide "a single remedy"); COMPENDIUM at 23 ("[W]orkmen's compensation became the exclusive remedy of employees against employers, with the effect that injured employees ordinarily lost the right to seek a higher tort liability award than their compensation benefits. This compromise is commonly termed 'the *quid pro quo*' of workmen's compensation."). And, as the Sixth Circuit acknowledged, Pet. App. 22a, Michigan's WDCA specifically states that it is the exclusive remedy: "The right to the recovery of benefits as provided in this act shall be the em-

ployee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort." MICH. COMP. LAWS § 418.131.[2] In contrast to RICO's provision for treble damages, Michigan's WDCA specifically limits penalties for benefits not paid to $50 per day with a cap of $1,500. *See* Pet. App. 25a–26a (quoting MICH. COMP. LAWS § 418.801(2)). Thus, unlike the Nevada laws addressed in *Humana*, Michigan's workers' compensation regime *is* "hermetically sealed" and *does* "exclude application of other state laws." *Humana*, 525 U.S. at 312.

Proper application of the factors relied on in *Humana* should have compelled the Sixth Circuit to recognize that permitting RICO claims for treble damages arising from workers' compensation cases would, to put it mildly, "interfere with a State's administrative regime." *Humana*, 525 U.S. at 310.[3] As the district court noted, allowing RICO claims "would turn on its head the policy balance that the Michigan legislature struck in the WDCA" by

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[2] The intentional tort exception is limited, by statute, to situations where an "employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MICH. COMP. LAWS § 418.131(1). That exception is not applicable here.

[3] This Court also noted in *Humana* that the State of Nevada had not filed a brief urging that applying RICO would frustrate any state policy or impair the administrative regime. 525 U.S. at 313. Here, Michigan has enacted a statute to make workers' compensation an exclusive remedy, MICH. COMP. LAWS § 418.131. There can be little doubt that Michigan's policy is to preclude other remedies.

"rob[bing] . . . employers of the benefits that they were supposed to receive from the WDCA's policy balance." Pet. App. 63a–64a. The Sixth Circuit's ruling directly "interfere[s] with [Michigan's] administrative regime." *Humana*, 525 U.S. at 310.

II. THE SIXTH CIRCUIT'S DECISION WILL IMPOSE SEVERE COSTS ON EMPLOYERS AND WILL UNDERMINE WORKERS' COMPENSATION SYSTEMS

The decision of the Sixth Circuit, if left undisturbed, will inflict economic hardship on Sixth Circuit employers, and by extension, on Sixth Circuit employees. Increasing the potential liability to employers and insurance providers for denying workers' compensation benefits by 300% will impose significant additional costs on employers (and employees), will undermine the "*quid pro quo*" of workers' compensation, *Howard Delivery*, 547 U.S. at 662–63, will greatly increase the litigation costs associated with workers' compensation, and will remove the incentives for employers to self-insure.

A. Trebling Workers' Compensation Claims Increases Employers' Exposure By Billions Of Dollars And Undermines The Foundation Of Workers' Compensation

Nearly all employers and employees in Michigan, Ohio, Tennessee, and Kentucky are covered by workers' compensation regimes. *See, e.g.*, *Mich. Annual Report*, *supra* note 2, at 1 ("[I]t is easier to discuss the exceptions."). In Michigan, for example, more than 240,000 employers are subject to the WDCA, *id.* at 11, and in Kentucky, "[a]pproximately 80,000 employers . . . are covered under Kentucky's workers' compensation law," Ky. Dep't of Workers' Claims, http://www.labor.ky.gov/workersclaims/ (last visited

June 5, 2009). As for employees, in 2006 a total of roughly 13.6 million employees in the Sixth Circuit were covered by workers' compensation—4.1 million in Michigan, 5.2 million in Ohio, 2.6 million in Tennessee, and 1.7 million in Kentucky. Nat'l Acad. of Soc. Ins., *Workers' Compensation: Benefits, Coverage, and Costs, 2006* 10–11, *available at* http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf (hereinafter "*NASI Report*"). This coverage resulted, for the year of 2006 alone, in the payment of $5.35 billion in workers' compensation benefits. *Id.* at 20–21 (calculated from state totals in table). The potential additional risk to employers in the Sixth Circuit as a result of this decision—that is, the risk they must take into account when purchasing insurance or when setting aside funds for self-insurance—is significant. Not only are employers and workers' compensation insurance providers faced with possible treble damages and attorney fees under RICO for denying claims, but they can now be forced to incur the expense of litigating a RICO claim while the employee also pursues recovery of workers' compensation benefits through normal administrative channels. This is a dramatic departure from what the Sixth Circuit described as "merely" the bargain of workers' compensation that state legislatures have adopted to spread the risks associated with workplace injuries.

B. Permitting RICO Claims Against Self-Insured Employers Will Drive Out Self-Insurance

The Sixth Circuit's decision also emphasizes that Cassens happens to self-insure, *see* Pet. App. 24a, 26a, claiming that this provides an additional basis for its decision. But even if the decision applied only to self-insurers, the effects of the court of appeals'

opinion would still be dramatic. Self-insured employers would still face the risk of RICO claims, the additional risk of treble damages and attorney fees under RICO, and the associated litigation expense, all of which will likely outweigh the savings arising from self-insurance. The natural result of these risks could well drive self-insurance out of the market. This outcome would have a substantial harmful effect on employers in Sixth Circuit states; in Michigan, for example, 42% of workers' compensation benefits in Michigan were paid by self-insured employers. *See NASI Report* at 20–21 (percentage derived from chart). In 2006 alone, self-insured employers paid out $612 million in benefits in Michigan; $435 million in Ohio; $260 million in Kentucky; and $191 million in Tennessee. *Id.* As "[s]elf-insurance works best when an employer has a spread of risk so large that the employer may benefit from the law of large numbers," CHAMBER OF COMMERCE ANALYSIS at 7, the employers who will be most affected by this decision include large companies, like the Big Three automakers, that are already experiencing financial hardship.

In addition, driving out self-insurance will "interfere with [States'] administrative regime[s]." *Humana*, 525 U.S. at 310. The workers' compensation regimes of each of the four states in the Sixth Circuit have specific rules directed at regulating self-insurance. *See, e.g.*, MICH. COMP. LAWS § 418.611; OHIO REV. CODE ANN. § 4123.35(B); TENN. CODE ANN. § 50-6-405; KY. REV. STAT. ANN. § 342.340; *see also NASI Report* at 10–13 (chart showing that 48 states allow self-insurance for workers' compensation). These statutes exist because these states have recognized that self-insurance is a cost-effective way for large companies (and groups of companies under

group self-insurance programs) to provide workers' compensation benefits, and the state legislatures have made the policy decision to authorize self-insurance. These portions of the states' regimes will, however, become largely irrelevant in light of the new incentives against self-insuring the Sixth Circuit has imposed.

CONCLUSION

Further percolation in the courts of appeals is unnecessary—the issue raised by this petition is already crystallized. Allowing employees to assert RICO claims against employers for denying workers' compensation insurance benefits will have the very deleterious effect on States' insurance regimes that the McCarran-Ferguson Act is intended to prevent. Moreover, additional decisions by other courts of appeals are unlikely to lead the Sixth Circuit to change its view, given that it has already denied rehearing en banc. In light of the exceptional importance of this case and for all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 08-1375

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

Motion for Leave to File a Brief *Amici Curiae* in Support of Petitioners

Brief *Amici Curiae* Of National Council of Self-Insurers, Illinois Self Insurers Association and Ohio Self-Insurers Association

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPPORT OF THE PETITIONERS

The National Council of Self-Insurers, the Illinois Self Insurers Association and the Ohio Self-Insurers Association ask this Court for leave to file a brief *amici curiae* in support of the Petitioners.

The attorneys of record for the parties have received written notice that one or more of these associations intended to file a brief *amici curiae*. That notice was issued on May 18, 2009 – more than 10 days before the June 8, 2009 deadline for the submission of a brief *amicus curiae*.

Counsel for the Petitioner consented to the associations' filing of such a brief. Counsel for the Respondent withheld his consent.

As the Court will see ("Interest of the *Amici Curiae*," *post*), these associations are interested in the continued vitality of 'exclusive remedy' provisions under state workers' compensation schemes. They disagree with the Court of Appeals' holding; they are disturbed by the erosion of the 'exclusive remedies' that it portends.

Respectfully submitted,

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INTEREST OF *AMICI* CURIAE

The National Council of Self-Insurers[1] is a national organization of employers and professionals devoted to perpetuation and betterment of self-insurance for work-related injuries.

The Illinois Self Insurers Association is an association of Illinois employers (including public employers such as municipalities, school districts and other bodies politic, and many of the state's largest industries) who have been approved as self-insurers by the Illinois Workers' Compensation Commission.

The Ohio Self-Insurers' Association has over 250 members. Their employees account for one-third of the Ohio work force and 40 percent of the Ohio payroll.

The Court of Appeals' decision in the case at bar concerns these associations and their constituents. If that decision stands, the adversarial tensions that attend workers' compensation disputes may percolate uncontrollably. Employees, whose recourse historically has been limited to administrative proceedings, could also prosecute RICO[2] actions in state or federal courts.

Legitimate RICO actions could beget duplicative recoveries or contradictory results. Adroit jurisprudence might prevent or correct such anomalies. But it would not relieve employers of the

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[1] No counsel for any party wrote any part of this brief *amici curiae*. No one other than the *amici curiae* made a monetary contribution to preparation and submission of this brief *amici curiae*.

[2] The Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§1961-1968.

amplified cost of defending workers' compensation claims in multiple forums.

SUMMARY OF THE ARGUMENT

Employers are functionally 'insurers,' and injured workers are 'insureds,' as a consequence of workers' compensation laws. Those laws impose upon employers responsibility for all sorts of industrial injuries – even when they are blameless. To balance that breadth of liability, legislators restricted its depth. Compensation was strictly limited to benefits established by workers' compensation statutes.

That balance is imperiled by an injured worker's right to sue under RICO.

ARGUMENT

I.

THE INTERPLAY BETWEEN RICO AND WORKERS' COMPENSATION LAW HAS NATIONWIDE IMPLICATIONS.

The Court of Appeals has determined that a civil suit under RICO[3] is viable, notwithstanding the "exclusive remedy" provision of the Michigan Workers' Disability Act.[4] *Brown v. Cassens Transport Co.*, 546 F.3d 347 (6th Cir. 2008). The resultant precedent has transcendent implications. Workers' compensation laws, though varying somewhat from state to state, are ubiquitous:

> There is a workmen's compensation act for each of the 50 states, and for five of the six other "States" we were asked to study. There are also two Federal workmen's compensation programs, for a total of 58 jurisdictions. (See Glossary) No two acts are exactly alike, but many have similar basic features.
>
> Report of the National Commission on State Workmen's Compensation Laws, Part I, ch.1, p. 32 , (U.S. Government

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[3] *Supra.* See Note 2.

[4] Mich. Comp. Laws, §418.01, *et seq.*; Mich. Comp. Laws, §418.131(1).

Printing Office, 1972) [hereinafter "1972 Commission Report"].

Those workers' compensation laws almost universally have "exclusive remedy" provisions that limit employers' liability to injured workers to the benefits established by the respective workers' compensation acts. 6 Arthur Larson, Larson's Workers' Compensation Law, §§ 101.01-101.02, pp. 101-1 – 101-6 (Matthew Bender & Co., Inc., 2007). Even federal workers' compensation systems have "exclusive remedy" provisions. *See, e.g.,* the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905.

In Illinois there are about 250,000 work-related injuries per year. Illinois Workers' Compensation Commission, FY2007 Annual Report, p. 13.[5] The Illinois Workers' Compensation Commission – the agency that enforces the Illinois Workers' Compensation Act[6] – receives 60,000 to 70,000 claims annually. *Ibid.* The median medical costs of those claims are $5,779.00. *Id.*, p. 22. Their median indemnity costs are $22,279.00. *Ibid.*

Nationally about 5% of the workforce are injured each year. *Ibid.* With medical and indemnity costs combined, the national median for work-related injuries is over $23,000.00. *Ibid.* About 2.5% of employers' payrolls go to workers' compensation premiums. *Ibid.*

'Insurers,' however, are not the only entities answering for work-related injuries. In Illinois

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[5] http://www.iwcc.il.gov/annualreport07.pdf

[6] 820 Ill. Comp. Stat., ch. 305, § 13 (2008).

almost 300 employers are approved self-insurers.[7] *Id.*, p. 9. "Less than 1% of employers self-insure, but they are among the largest organizations in the state, and employ roughly 10% of the employees in Illinois." *Ibid.*

In 2005 $2.4 billion was spent on Illinois workers' compensation benefits. *Id.*, p. 23. Nationwide, some $52.00 billion was expended. *Ibid.*

Should the *Brown* decision stand, employers' limited liability, heretofore ensured by "exclusive remedy" provisions, will be largely nullified. That nullification would substantially increase the costs of doing business – directly for self-insured employers; indirectly, through premium increases, for others. The most benign effect of such increases would be commensurate rises in the costs of goods and services. But the economic impact could be so profound that some employers would curtail or close their operations.

The *Amici* therefore pray that this Honorable Court grant the Petition for a Writ of Certiorari.

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[7] 820 Ill. Comp. Stat., ch. 305, § 4(a) (2008).

II.

'REVERSE PRE-EMPTION' INSULATES EMPLOYERS FROM CIVIL LIABILITY UNDER RICO.

A.

State Laws Regulating The Business Of Insurance Are Not Always Subordinate To Federal Legislation.

Federal laws typically trump state laws. See, *e.g., California Federal Savings & Loan Association v. Gurerra,* 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). Even when Congress does not expressly invoke its power of preemption, if federal and state enactments clash, the former usually prevail. *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996).

There is, however, an exception to this general hierarchy: the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 34, as amended, 15 U.S.C. §1012(b). That Act provides[8]: "No Act of Congress shall be

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[8] A more complete recital of the McCarran-Ferguson Act reads:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act

construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."

That enactment generated a "special anti-preemption rule," *Barnett Bank, supra,* 517 U.S., at 28. "[S]tate laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *United States Department of Treasury v. Fabe,* 508 U.S. 491, 507, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

The consequence of the McCarran-Ferguson Act, therefore, is "reverse" preemption. See, *e.g., Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London,* 543 F.3d 744, 747, n. 4 (5th Cir. 2008). Reverse preemption should apply here. The decision from the Court of Appeals should therefore be reversed.

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of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

59 Stat. 34, 15 U. S. C. § 1012.

B.

RICO Does Not Specifically Relate To The Business Of Insurance.

"RICO is not a law that 'specifically relates to the business of insurance'." *Humana Inc. v. Forsyth,* 525 U.S. 299, 307, 119 S.Ct. 710, 1426 L.Ed.2d 753 (1999).

C.

Workers' Compensation Laws Are Enacted To Regulate The Business Of Insurance.

1.

Common Sense Should Prevail.

This Court has promoted a "common-sense" approach to questions of preemption. *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). There the Court considered whether a Massachusetts statute "is a law 'which regulates insurance' . . . and so would not be pre-empted. . . ." *Id.,* 471 U.S., at 738 (addressing ERISA[9]). That statute required that some minimum *mental*-health coverage be

[9] The Employee Retirement Income Security Act of 1974 ["ERISA"], 88 Stat. 832, as amended, 29 U.S.C. §1001, *et seq.*

included in insurance policies or health-care plans that cover hospital and surgical expenses. *Id.,* 471 U.S., at 727. Invoking common sense, the Court determined that the state law indeed 'regulated insurance.' *Id.,* 471 U.S., at 740, 743.

Common sense has a significant role in the interpretation of the McCarran-Ferguson Act, *supra.* That Act saves from preemption state laws that have "the purpose of regulating the business of insurance. . . ." 15 U.S.C. §1012(b). "Rather than use the technical term 'underwriting' to express its meaning, Congress chose 'the business of insurance,' a common-sense term connoting not only risk underwriting, but contracts closely related thereto." *Group Life & Health Insurance Co. v. Royal Drug Co.,* 440 U.S. 205, 247, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979).

In *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002), the Court endorsed 'common-sense' as a proper methodology for construing both ERISA and McCarran-Ferguson. *Id.,* at 366. Later – in *Kentucky Association of Health Plans v. Miller,* 538 U.S. 329, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003) – the Court declared that the 'savings' criteria under ERISA and the 'reverse-preemption' criteria under McCarran-Ferguson were distinct. *Id.,* 538 U.S. at 339-42. But in no way did it banish common sense from any preemption calculus.

2.

Workers' Compensation Laws
Regulate The Business Of Insurance.

Workers' compensation laws – which establish substantive rights, provide (and limit) enumerated remedies, empower agencies to administer the laws and resolve disputes, and promote streamlined resolution of claims[10] – certainly were enacted "for the purpose of regulating" something. 15 U.S.C. §1012 (b). For McCarran-Ferguson to have effect, that 'something' must be "the business of insurance." *Ibid.*

The Court of Appeals decided that workers' compensation was not "insurance." *Brown, supra,* 546 F.3d, at 360. It determined that employers were not insurers, and employees not insureds, because a duty to compensate injured workers existed independent of an insurance contract. *Id.*, 546 F.3d, at 359-60. The lower court, however, was insensitive to the nuances of workers' compensation law.

Under the common law, employers ('masters') owed their employees ('servants') the duty to refrain from negligent conduct that could cause injury. But there was no duty to compensate injured workers – even those injured by their employers' negligence. A duty to compensate arose only after the workers survived a gauntlet of defenses. Employers had no 'duty to compensate' if their employees were even partially to blame for their injuries ('contributory

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[10] *Via, e.g.*, "simple and summary" procedures. 820 Ill. Comp. Stat., ch. 305, § 16 (2008).

negligence'). Employers had no 'duty to compensate' if their employees were injured through the fault of co-employees ('fellow servant doctrine'). Employers had no 'duty to compensate' if their employees were injured as a result of known perils ('assumption of risk'). 1 Larson, *supra,* § 2.03, pp. 2-3 – 2-5. *See also Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N.E. 211 (Ill. 1914).

As a result of these manifold impediments, most injured workers went uncompensated. The remainder still suffered the significant delay and substantial expense that attended civil litigation.

> At the opening of the 20th century, the shortcomings of the legal remedies for work-related injuries were common knowledge. The compensation system which based liability on negligence was an anachronism in a time when work was recognized to involve certain inherent and often unpredictable hazards. Awards for injuries generally were inadequate, inconsistent and uncertain. The system was wasteful, particularly because of high legal costs. Settlements were delayed by court procedures.
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> 1972 Commission Report, *supra,* Part I, ch. 1, p.34 (emphasis added).

Workers' compensation laws did not merely tinker with the tort system. They supplanted it on a broad scale. The resultant, remedial statutes "aimed

to provide adequate benefits, while limiting the employer's liability strictly to workmen's compensation payments." *Ibid.* (Emphasis added.) "Most radical . . . was the establishment of a legal principle alien to the common law: liability without fault." *Ibid.* That liability "is not a tort liability but is an obligation imposed as an incident of the employment relationship, the cost of which is to be borne by the business enterprise." *Arnold v. Industrial Commission,* 21 Ill. 2d 57, 61, 171 N.E.2d 26 (Ill. 1960).

The presumed *sine qua non* of 'insurance' that the Court of Appeals found to be lacking under workers' compensation schemes – "no insurer and no insured," *Brown, supra,* 546 F.3d, at 360 – is actually an historical vestige, not a dispositive distinction:

> The no-fault approach spread rapidly: between 1911 and 1920, all but six States passed workmen's compensation statutes. These laws were influenced by the contemporary interpretations of constitutional law. . . . New York . . . would have adopted the German compensation plan's feature of employee contributions had this been deemed constitutional.
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> 1972 Commission Report, *supra,* Part I, ch. 1, p. 34 (emphasis added).

Workers' compensation laws have been described as "state-mandated insurance systems that provided benefits to employees for work-related

injuries without regard to fault." *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995) (emphasis added). The National Commission that Congress[11] tasked to study the state of workers' compensation laws reported:

> Workmen's compensation is an insurance program designed to protect workers and their families against wage loss due to work-related injuries or diseases. . . .
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> 1972 Commission Report, *supra*, Part II, ch. 3, p. 58 (emphasis added).
>
> * * *
>
> The primary contribution to safety provided by workmen's compensation probably comes from the financial stimulus inherent in the insurance rate-making procedures used in every state.
>
> *Id.*, ch. 5, p. 93 (emphasis added).

The National Commission's perception of the essential nature of workers' compensation is not unique. A renowned commentator on workers' compensation stated: "The distinctive feature of compensation insurance is that, although it arises from a contract between the employer and the carrier, it creates a sort of insured status in the

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[11] The Occupational Safety and Health Act of 1970, Pub. L. 91-596, Sec. 27, 84 Stat. 1616, 29 U.S.C. §676.

employee which comes to have virtually an independent existence. . . ." 9 Larson, *supra,* § 150.20[1], pp. 150-9 – 150-11 (emphasis added).

For all practical purposes, then, workers' compensation laws govern "the business" of workers' compensation "insurance."

3.

In Responding To Work-Related Injuries Employers Act As Insurers.

This Court does not typically decide cases on the basis of mere labels.[12] Addressing a similar issue – whether Illinois' Health Maintenance Organization Act[13] was preempted by ERISA[14] – the Court declared: "Rush cannot check common sense by trying to submerge HMOs' insurance features beneath an exclusive characterization of HMOs as providers of health care." *Rush Prudential, supra,* 536 U.S., at 370.

Functions, not facile generalizations, determine whether or not a particular enterprise is subject to preemption. "That HMOs are not traditional 'indemnity' insurers is no matter. . . ." *Rush Prudential, supra,* 536 U.S., at 372-73 (internal quotation omitted).

The core functions of employers and workers' compensation insurers, *vis-à-vis* workers' compensation claims, are essentially indistinguishable.

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[12] "[M]ere matters of form do not detain us." *Fabe, supra,* 508 U.S., at 506 (*quoting SEC v. National Securities, Inc.,* 393 U.S. 453, 460, 89 S.Ct.564, 21 L.Ed.2d 668 (1969)).

[13] 215 Ill. Comp. Stat., ch. 125, § 4-10 (2000).

[14] 88 Stat. 832, as amended, 29 U.S.C. §1001, *et seq.*

Reverse preemption should therefore apply to both, by virtue of the criteria under the McCarran-Ferguson Act, 15 U. S. C. § 1012(b).

This Court has identified "three factors used to point to insurance laws spared from federal preemption under the McCarran-Ferguson Act. . . ." *Rush Prudential, supra,* 536 U.S., at 373:

> [1] practices or provisions that "ha[ve] the effect of transferring or spreading a policyholder's risk;
>
> [2] . . . [that are] an integral part of the policy relationship between the insurer and the insured; and
>
> [3] [are] limited to entities within the insurance industry."
>
> *Ibid.* (*quoting Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119, 129 (1982); internal quotation marks omitted).

In its effort to abide by those factors, however, the Court of Appeals fixated on formalistic technicalities:

> [T]he employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries, and workers' compensation merely creates a legislative remedy regarding the tort-liability relationship between employees and their employers, not an insurance contract. There is therefore no insurer and no insured.
>
> *Brown, supra*, 546 F.3d, at 359-60

But workers' compensation laws did not "merely" create legislative remedies for "tort-liability." They instead imposed *no-fault* liability – "a legal principle alien to the common law," 1972 Commission Report, *supra*, Part I, ch. 1, p. 34 – and *transferred* the economic risk of injury from isolated workers to the industry in which they were engaged. "Compensation for work-related accidents was therefore accepted as a cost of production." *Ibid.*

The relationship between employees and employers may lack the linguistic plumage that the Court of Appeals demanded. But that relationship still walks and quacks like "insurance." Employers should receive the same common-sense treatment as health maintenance organizations ["HMOs"]. Even though HMOs are not insurance companies *per se*, and even though they provide services outside the realm of traditional insurance, state laws directed to them are still laws regulating insurance. *Rush Prudential, supra*, 536 U.S., at 372-73.

Workers' compensation laws also pertain to the third McCarran-Ferguson factor: the liabilities,

rights and remedies they create form an "integral part of the policy relationship" between employees and employers. They confer an 'insured' status upon employees, despite the absence of a traditional policy relationship. Coverage under workers' compensation has even been deemed to be part of the employment *contract*:

> The provisions of the act become a binding contract as to all who accept them. So far as employers and employees under the act are concerned, all accidental injuries to workmen arising out of and in the course of their employment are to be paid for by the employer in whose service the injury occurred . . . at the rate fixed in the schedule established by the act. This provision constitutes part of the contract entered into by the election to accept the provisions of the act.
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> *Keeran v. Peoria, Bloomington & Champaign Traction Co.*, 277 Ill. 413, 421, 115 N.E. 636, 639 (Ill. 1917)

States' workers' compensation laws may not explicitly "alter or control the actual terms of insurance policies. . . ." *Kentucky Association, supra,* 538 U.S., at 338. They don't have to. "[I]t suffices that they substantially affect the risk pooling arrangement. . . ." *Ibid.*

Workers' compensation laws *dictate* or *supersede* contractual terms and conditions . . . and extend coverage from the *nominal* 'insureds' (employers) to

the true beneficiaries – the injured workers. "Compensation insurance . . . has come to be an integral part of the compensation system; and the ultimate object of that system is the assurance of appropriate benefits to employees." 9 Larson, *supra,* § 150.02[1], p. 150-10. Professor Larson presented an anticipatory rejoinder to the Sixth Circuit's rigid rationale:

> The distinctive feature of compensation insurance is that, although it arises from a contract between the employer and the carrier, it creates a sort of insured status in the employee which comes to have virtually an independent existence. If compensation insurance did no more than protect the employer from any liability incurred by the employer under compensation law, there would be no occasion for a discussion of such insurance in connection with compensation law at all; the employer's rights would be fixed by substantive compensation law, and all questions of the insurer's relation to the liability would be a simple application of the general law of insurance, just as an automobile liability insurer's position is worked out by a direct interpretation of the insurance contract. Compensation insurance, however, has come to be an integral part of the compensation system; and the ultimate object of that system is the assurance of appropriate benefits to employees. The

> insurance carrier therefore stands in two relations: to the employer, to protect it from the burden of its compensation liability, and to the employee, to ensure that he or she gets the benefits called for by the statute. The former relationship is governed largely by the insurance contract; the latter is governed by the statute.
>
> *Id.* (footnotes omitted).

Exclusive remedies, in particular, are also "an integral part of the policy relationship between the insurer and the insured." *Rush Prudential, supra,* 536 U.S., at 773. Establishing no-fault liability for basic benefits as "the employer's exclusive liability for work-related injuries and diseases . . . was a deliberate choice." 1972 Commission Report, *supra,* Part I, ch. 1, p. 32. It is a "basic feature" of workers' compensation laws. *Ibid.*

> Workmen's compensation statutes, as an alternative to the common law and employers' liability acts, had many objectives, most of them designed to remedy past deficiencies. The statutes aimed to provide adequate benefits, while limiting the employer's liability strictly to workmen's compensation payments.
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> *Id.,* Part I, ch. 1, p. 34 (emphasis added).

* * *

> Damage suits against employers by workers injured on the job are a possible substitute or supplement for workmen's compensation benefits. For reasons detailed in Chapter 7, we believe these suits are inappropriate. . . . We recommend that workmen's compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.
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> *Id.*, Part I, ch. 2, p. 52 (emphasis added).[15]

Because the relationship between employers and employees, *vis-à-vis* spreading of risk and provision of benefits, is tantamount to "insurance," as that term is construed under the McCarran-Ferguson Act, state workers' compensation laws "[are] limited to entities within the insurance industry."

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[15] The findings and conclusions of the 1972 Commission Report were revisited in 2004, along with an updated assessment of implementation of the commission's "essential recommendations." No repeal or dilution of 'exclusive remedy' provisions was recommended. U. S. Department of Labor, State Workers' Compensation Laws in Effect on January 1, 2004 Compared With the 19 Essential Recommendations of the National Commission on, (2004)..http://www.workerscompresources. com/National Commission_Report/National_Commission/12004/Jan2004_nat_com.htm.State Workmen's Compensation Laws. (2004).

Such laws are not broad, societal imperatives or prohibitions. They are specific to employer-employee relationships, and the legal consequences arising from work-related injuries or illnesses.

Workers' compensation laws, therefore, satisfy all three factors for "[a] law regulating insurance for McCarran-Ferguson purposes. . . ." *Rush Prudential, supra,* 536 U.S., at 373.

4.

Reverse Preemption Applies
Even To Self-Insurers.

In the case at bar, of course, no true "insurance" company is involved. To the extent that the Petitioners would be protected by Michigan's 'exclusive remedy' provision,[16] however, their status as 'non-insurers' would be immaterial. *Rush Prudential, supra,* is again instructive, by way of parallel considerations with regard to HMOs:

> Even if we accepted Rush's contention, rejected already, that the law regulates HMOs even when they act as pure administrators, we would find the third factor satisfied. That factor requires the targets of the law to be limited to entities within the insurance industry, and even a matchmaking HMO would fall within the insurance industry.

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[16] Mich. Comp. Laws §418.131(1).

Rush Prudential, supra, 536 U.S., at 374-75 (emphasis added).

The defendants/petitioners in the instant case were subject a statute "regulating the 'business of insurance,'" just as HMOs were in *Rush Prudential, supra.* "There can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance.'" *Fabe, supra,* 508 U.S., at 503. Performance of obligations under a workers' compensation system – an insurance analogue – likewise "falls within the 'business of insurance.'"

Under McCarran-Ferguson, therefore, their potential liability under RICO is negated by reverse preemption.

D.

Application Of RICO In The Underlying Case Would Violate, Impair or Supersede Workers' Compensation Laws.

The McCarran-Ferguson Act does not *automatically* invalidate application of federal law when it has the capacity to affect the "business of insurance." Before reverse preemption can occur, there must be some incompatibility between the federal and the state laws. "When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action." *Humana*

Inc., supra,, 525 U.S., at 303.

The Court of Appeals observed: "The district court's assertion that a RICO suit would impair the WDCA's policy of limited liability for employers relies on the faulty premise that the state has a policy of limited liability for employers even when they *fraudulently* deny worker's compensation benefits. No authority supports this position." *Brown, supra,* 546 F.3d, at 363 (emphasis in original). In Illinois (as in several other states[17]), however, even allegations of an insurer's "maliciously deceptive" handling of workers' compensation claims cannot breach the 'exclusive remedy' provisions[18] of the Illinois Workers' Compensation Act. *Robertson v. Travelers Insurance Co.,* 95 Ill. 2d 441, 448 N.E.2d 866 (Ill. 1983).

The Court should consider the wisdom of Professor Larson:

> It seems clear that a compensation claimant cannot transform a simple delay in payments into an actionable tort merely by invoking the magic words "fraudulent, deceitful and intentional" or "intentional infliction of emotional distress" or "outrageous conduct" in his complaint. The temptation to shatter the exclusiveness principle by reaching for the tort weapon

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[17] See, *e.g.,* 6 Larson, *supra,* §§ 100.01-100.04, pp. 100-1 – 100-22.

[18] 820 Ill. Comp. Stat., ch. 305, § 5(a) (2008); 820 Ill. Comp. Stat., ch. 305, § /11 (2008).

> whenever there is a delay in payment or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.
>
> 6 Larson, *supra,* §104.05[3], pp. 104-35 – 104-35 (emphasis added).

On more than one occasion federal tribunals have expressly recognized and heeded Professor Larson's admonition. *Atkinson v. Gates, McDonald & Co.,* 838 F.2d 808, 814 (5th Cir. 1988); *Sample v. Johnson,* 771 F.2d 1335, 1347 (9th Cir. 1985).

When RICO and workers' compensation laws proscribe like conduct, but afford different (or, potentially, redundant) remedies, application of RICO will "violate" and "impair" the state enactments. As noted above, the no-fault liability engendered by workers' compensation laws was offset by *limited* liability. "The exclusive remedy provision 'is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.' (2A A. Larson, Law of Workmen's Compensation § 65.11 (1988).)" *Meerbrey v. Marshall Field & Co.,* 139 Ill. 2d 455, 462, 564 N.E.2d 1222 (Ill. 1990). Under statutory systems such as Illinois', unreasonable or vexatious conduct in the handling of workers' compensation claims can give rise to *additional*

liability under the Workers' Compensation Act.[19] But only under that Act. *Robertson, supra,* 95 Ill. 2d 441.

RICO, however, can disrupt the balance calibrated by state legislatures. It provides neither fair compensation, nor full compensation, but *treble* damages. 18 U.S.C. § 1964(c). In *addition* to multiplied damages, RICO imposes liability for prevailing plaintiffs' attorney fees. *Ibid.* Employers and insurers, therefore, may have to finance duplicative defenses – one before the administrative agency that adjudicates workers' compensation claims; another in the RICO action – provide treble, quadruple or 4.5 times damages,[20] and finance their employees' prosecutions of RICO actions.

Permitting RICO claims, arising out of workers compensation disputes, "would invite the indefinite prolonging of litigation and risk double recoveries and inconsistent findings of fact, a result which the legislature, in enacting a system of compensation in place of common law remedies, certainly wished to avoid." *Robertson,, supra,* 95 Ill. 2d 441, at 451.

This Court has declared: "[w]hen federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act

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[19] See, *e.g.*, 820 Ill. Comp. Stat., ch. 305, §19(k) (2008); 820 Ill. Comp. Stat., ch. 305, § 19(l) (2008).

[20] The underlying benefits wrongfully withheld, plus 50% penalties (820 Ill. Comp. Stat., ch. 305, § 19(k) (2008)), plus RICO's treble damages. 18 U.S.C. § 1964(c).

does not preclude its application." *Humana Inc., supra,* 525 U.S., at 301. With respect to Illinois law (and likely with respect to the law of most, if not all of the states[21]), however, RICO directly conflicts with state regulation – by permitting greater remedies, and potentially redundant compensation, in contravention of the Workers' Compensation Act's 'exclusive remedys' provisions.[22] Its application would also frustrate a declared state policy – the inextricability between no-fault liability and limited damages. *Robertson, supra,* 95 Ill. 2d 441, at 451.

> The [workmen's compensation] act, in taking away existing rights of action of the employee and extending the liabilities of the employer, fixes limits to the amount to be recovered, and is sustained as a legitimate exercise of the police power for the promotion of the general welfare by covering the entire subject with fixed rules.
>
> *Matthieson & Hegeler Zinc Co. v. Indus-trial Commission,* 284 Ill. 378, 383,120 N.E. 249 (Ill. 1918) (emphasis added).

RICO is so potent that it can disrupt a state's administrative regime. Administrative adjudications may be postponed, pending the outcome of RICO actions. State-based fraud investigations might be deferred when complaints of fraud portend

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[21] See, *e.g.,* 6 Larson, *supra,* §§ 100.01-100.04, pp. 100-1 – 100-22.

[22] See note 18, *ante.*

resolution through civil actions. Baseless allegations, superficially dignified when motions to dismiss are denied, could precipitate needless investigations.

The economic impact of RICO could itself "frustrate . . . declared state policy or disturb the State's administrative regime." *Humana Inc., supra,* 525 U.S., at 304 (1999.) The 1972 national study of workers' compensation laws, though critical of the benefits then afforded under such laws, was sensitive to the costs of reform. 1972 Commission Report, *supra,* Part III, ch. 7, pp. 128-29. It estimated that implementation of its "essential recommendations" would raise workers' compensation premiums about 25% -- from "one percent or less" of payroll dollars to "1.25 percent or less." *Id.,* p. 128.

When the status of workers' compensation laws was revisited in 2004, on average 67.54% of the commission's recommendations had been met. U.S. Department of Labor, State Workers' Compensation Laws in Effect on January 1, 2004 Compared With the 19 Essential Recommendations of the National Commission on State Workmen's Compensation Laws, Table 1 (2004).[23] Yet by 2006 the national median insurance rates, per $100 of payroll, was $2.48 – almost double the percentage anticipated by the 1972 commission. Illinois Workers' Compensation Commission FY2007 Annual Report, p. 22; 1972 Commission Report, *supra,* Part III, ch. 7, p. 128.

Such costs can only escalate if federal litigation is allowed to sprout from workers' compensation disputes. If only one percent of work-related

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[23] http://www.workerscompresources.com/NationalCommission_Report/National_Commission/12004/Jan2004_nat_com.htm.

injuries were to generate RICO actions, every year there would be 600 to 2,500 RICO civil suits filed in Illinois alone – and multitudes more nationally. Illinois Workers' Compensation Commission, FY-2007 Annual Report, pp. 5, 13.

The proliferation of such litigation would not just be expensive to employers; it would be disruptive to the workers' compensation system as a whole. So found the National Commission:

> **Workmen's Compensation and Damage Suits**
>
> Damage suits against employers by workers injured on the job are a possible substitute or supplement for workmen's compensation benefits. . . . [W]e believe these suits are inappropriate.
>
> R2.18
>
> **We recommend that workmen's compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.**

1972 Commission Report, *supra*, Part II, ch. 2, p. 52 (boldface in original; emphasis added).

* * *

[C]osts of litigation which affect the performance of the delivery system . . .

may be . . . substantial. These costs include delays and uncertainties resulting from legalistic jousting over means of determining benefits, as well as the immeasurable cost of interference with or delay of rehabilitation of the disabled. An equally tragic side-effect of litigation is the tendency to polarize attitudes of labor and management to the extent that both resist reforms that would be to their common advantage.

Workmen's compensation can be undermined by excessive litigation.

Id., Part II, ch. 6, p. 100 (emphasis added).

* * *

The determination of negligence tends to be expensive and the outcome uncertain. Payments tend to be delayed when negligence suits are prosecuted, and overcrowded court dockets would compound the delays. Some workers eventually would receive damage awards in excess of workmen's compensation benefits, but others would receive no protection. Moreover, even when the worker succeeded in winning monetary damages, the litigation could be a substantial deterrent to successful rehabilitation.

> We conclude that damage suits are a distinctly inferior alternative to workmen's compensation.
>
> *Id.*, Part III, ch. 7, p. 120 (emphasis added).

Soon after the National Commission's endorsement of 'exclusive remedy' provisions generally, an Illinois court emphatically enforced its state's particular provision:

> The continued effectiveness of the workmen's compensation scheme depends upon the continued ability to spread the risk of such losses. This, in turn, depends upon the maintenance of the legislative scheme. If employers are required to provide not only workmen's compensation, but also to defend and pay in common law actions, their ability to spread such risks through reasonable insurance premiums is threatened. Any exceptions to the exclusive remedy provision of the Workmen's Compensation Act or any theories which allow that provision to be circumvented must be strictly construed.
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> *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 789, 354 N.E.2d 553 (Ill. App. 1976) (emphasis added).

Even without consideration of the McCarran-Ferguson Act's reverse preemption, at least one court has determined that "RICO would allow a claim . . . which the state act bars, resulting in a limitation, if not a conflict." *Tellis v. United States Fidelity and Guaranty Co.*, 625 F.Supp. 92, 95 (N.D. Ill.1985), *aff'd. on other grounds,* 805 F.2d 741, *vacated and remanded on other grounds,* 483 U.S. 1015, *aff'd. on other grounds,* 826 F.2d 477.

RICO, therefore, cannot be allowed to prevail over express provisions of state law that limit employers' liabilities under workers' compensation systems.

CONCLUSION

The Court of Appeals has allowed general federal legislation to disrupt state regulation of the business of insurance. Its ruling and rationale run afoul of the McCarran-Ferguson Act, and preemption principles generally. The *Amici* therefore pray that this Court grant the Petition for Certiorari filed by the defendants below.

Respectfully submitted,

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No.08-1375

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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MOTION OF DRI – THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS FOR CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, DRI – The Voice of the Defense Bar ("DRI") hereby moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners for a writ of certiorari. DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its membership and to the judicial system. The Sixth Circuit's decision to become the first and only court in the country to expand the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO") to private plaintiffs suing their employers for denying workers' compensation claims poses a distinct threat to the efficient and fair administration of justice. This unprecedented decision would inject costly private litigation into state workers' compensation systems intended to provide an exclusive remedy for workplace injuries – systems that states developed many years before RICO was enacted to benefit employees and

employers by substituting predictable but limited recovery for expensive and uncertain private tort litigation against employers. It could also lead to consequences in areas other than workers compensation, if the Sixth Circuit's erroneous reasoning is employed to extend the expansive federal RICO remedy to other exclusive and comprehensive remedial systems where it was never intended to apply.

The important legal issues in this case are, accordingly, of substantial concern to DRI. Since its members have first-hand experience with litigation under RICO, the McCarran-Ferguson Act, and in the field of workers' compensation, DRI is well-suited to address the deleterious consequences of the Sixth Circuit's decision.

This motion is necessary because respondents' counsel has not consented to the filing of this brief in response to DRI's timely written request for consent.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

DRI – The Voice of the Defense Bar ("DRI") submits this *amicus curiae* brief in support of petitioners.[1] The interests of the *amicus curiae* are set forth in the accompanying motion.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision to permit Michigan workers' compensation beneficiaries to bring RICO claims would inject broad new federal remedies into an established and longstanding administrative system that provides workers with an exclusive remedy. Michigan's system (like those in other states) is intended to offer predictable and speedy compensation for workplace injuries without reference to fault. It permits no private right of action for damages, except for certain intentional torts committed in the workplace. The Sixth Circuit's decision expanding RICO into this comprehensive and exclusive remedial system is contrary to this Court's decision in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and conflicts with the

[1] Counsel of record received notice at least 10 days prior to the due date of *amicus'* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

reasoning in cases from other Circuits concluding that Congress did not intend RICO to preempt existing exclusive remedial systems.

Certiorari is also warranted to review the Sixth Circuit's incorrect conclusion that workers' compensation does not involve the business of insurance – although the system plainly transfers and reallocates risk and although it requires employers either to purchase workers' compensation insurance or receive state approval to self-insure after meeting specific statutory and regulatory standards. Moreover, the decision below should be reviewed in order to reverse the incorrect holding that employers who choose the self-insurance option are not part of the business of insurance. That distinction posits an anomalous situation where workers hired by companies that self-insure have RICO claims while those who happen to work for companies that buy insurance do not.

Finally, the decision below raises troubling policy and practical implications that go far beyond the particular circumstances of this case. Engrafting RICO remedies onto longstanding state workers' compensation systems would remove a substantial number of workers' compensation claims from the hands of knowledgeable administrative officials and inject them into the courts, where the states have made a policy decision that they do not belong. Among other clear consequences, the decision below would further crowd federal and state dockets, increase the burden and costs on employers, and seriously erode employees' entitlements under workers' compensation plans. Unless it is reversed,

the decision in this case could also impair other self-contained administrative systems designed to provide a limited, but exclusive, remedy.

This Court should grant certiorari to ensure consistency in this important area of the law, to prevent the broad encroachment of a federal remedy where none was intended, to assure correct application of the *Humana* decision, and to protect important and long-standing state policy decisions.

ARGUMENT

I. This Court Should Grant Certiorari to Address the Sixth Circuit's Expansion of RICO Into An Exclusive and Self-Contained Administrative Regime

A. The History of Worker's Compensation Law Shows the States' Intent To Provide Exclusive Remedies for Workplace Injuries

Before states began enacting workers' compensation laws in the early 1900s, employees could obtain compensation for workplace injuries only by winning civil suits for negligence against their employers. Employee victories were few, however, because employers benefited from broad legal defenses such as contributory negligence and assumption of the risk. As a result, workers rarely received any compensation for their injuries, yet they frequently suffered the delays and high costs of litigation. Moreover, in the rare instances when workers won, employers could not reliably predict the timing and amounts of their losses. National

Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs*, 2006 (Aug. 2008), *available at* http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf. ("NASI Report"), at p. 6; Edward M. Welch & Daryl C. Royal, Worker's Compensation in Michigan: Law and Practice (5th ed. 2007) ("Welch & Royal"), at §1.2 (Michigan Worker's Disability Compensation Act was enacted in 1912; before that, employees could recover only through a successful tort suit).

States created workers' compensation programs, accordingly, to provide injured workers with a reliable, predictable, and speedy source of compensation for medical treatment and lost wages "regardless of who was at fault." NASI Report at 6. The "quid pro quo" for this allocation of risk to the employer is that the "the employer's liability [is] limited." *Id.* "Under the exclusive remedy concept, the injured employee accepts workers' compensation as payment in full and gives up the right to sue." *Id.*

"The exclusivity provision is the bedrock of the workers' compensation system." *Doss v. Food Lion,* 477 S.E.2d 577, 578 (Ga. 1996). As the Michigan Supreme Court has explained, "[t]he 'primordial intent' [of the legislature in enacting the WDCA] was that the quo to be received by the employer in return for his quid would be outright and absolute immunity from liability (except as provided in the act) stemming from each compensable injury.' The exclusivity provision is an example of the importance which the drafters of workers' compensation laws, generally, placed on simple, automatic remedies."

Downie v. Kent Prods., Inc., 362 N.W.2d 605, 613 (Mich. 1984) (quoting *Husted v. Consumers Power Co.*, 135 N.W.2d 370, 375 (Mich. 1965) (emphasis added)). Extending tort liability to employers for denying workers' compensation benefits would ignore the fact that "the employer has already made concessions and assumed liabilities to the employee" and would further "sacrifice[] simplicity and efficiency." *Id.* at 617.

Consistent with the legislature's intent that that workers' compensation provide an exclusive remedy – and with similar laws nationwide – the Michigan Worker's Disability Compensation Act ("WDCA") provides that "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." Mich. Comp. Laws §418.131(1). The WDCA provides a comprehensive scheme that prescribes the types and amounts of benefits available and provides administrative processes for resolution of disputes regarding those benefits. Michigan employers cannot raise defenses of contributory negligence, assumption of risk, or that the injury was caused by a fellow employee. Mich. Comp. Laws §418.141.[2] In exchange,

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[2] Employees may not, however, recover for injuries arising out of their own willful and intentional misconduct. *Id.* at §418.305. The only exception to the exclusive remedy system is that employees may sue to recover for intentional torts in the workplace, such as harassment by a supervisor or co-worker, and for harm beyond the physical (*i.e.* false imprisonment or intentional infliction of emotional distress). *See* Welch & Royal at §§3.9-3.12.

employers' liability is limited: Michigan workers may recover only lost wages, medical treatment costs, and certain rehabilitation services under the Act. Welch & Royal at §1.2. The WDCA also caps the amount of compensation an injured employee may recover. *See* Mich. Comp. Laws §§418.301, 418.319, 418.321, 418.335, 418.345, 418.351, 418.352, and 418.355.

The sole method to obtain workers' compensation benefits in Michigan is through the administrative process. The WDCA created the Bureau of Worker's Compensation, whose mission is "to efficiently administer the Workers' Disability Compensation Act of Michigan, which includes carrier and employer compliance, timely benefits payment and the prompt and fair adjudication of claims involving Michigan's injured workers." Workers' Compensation Agency 2008 Annual Report at 7, *available at* http://www.michigan.gov/documents/wca/wca_2008_Annual_Report_277025_7.pdf. Under the WDCA, workers' compensation magistrates who initially hear claims (Mich. Comp. Laws §418.206) must either be specially trained – they must pass an examination to demonstrate "(1) knowledge of the Act, (2) fact-finding skills, (3) knowledge of the [Michigan Rules of Evidence], and (4) a basic understanding of human anatomy and physiology" – or they must have practiced as attorneys in the field of workers' compensation for at least five years. Welch & Royal at §17.47. Workers may appeal magistrate decisions to a seven-member Workers' Compensation Appellate Commission ("WCAC"). Mich. Comp. Laws §418.274. In addition, workers may petition for further review of decisions of the

WCAC to the Michigan appellate courts. Welch & Royal at §18.12.

Michigan law does not permit tort suits for wrongful, or even bad faith, denial of workers' compensation benefits. *Wright v. DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 845 (E.D. Mich. 2002) ("the denial of workers' compensation benefits, even in bad faith, is not tortious.") (emphasis added). *See also Lisecki v. Taco Bell Restaurants, Inc.*, 389 N.W.2d 173, 174-76 (Mich. Ct. App. 1986) (employer's alleged collusion with the insurance company to terminate workers compensation benefits would be "bad faith" and would "call into serious question the business practices of the defendants," but would not warrant a remedy outside the WDCA); *Hajciar v. Crawford & Co.*, 369 N.W.2d 860, 864 (Mich. Ct. App. 1985) (employer's alleged termination of an amputee's benefits to induce him to take a lump sum payment he had previously refused did not constitute intentional infliction of emotional distress and thus plaintiff had no remedy outside the WDCA)

B. Under This Court's Jurisprudence, RICO Should Not Be Expanded To Interfere With Exclusive Remedial Regimes Like The Michigan Workers' Compensation System

There was no indication when Congress enacted RICO in 1970 that it intended to supplant century-old workers' compensation systems by imposing a RICO remedy in place of remedies created by the states to provide exclusive recovery for workplace injuries. Michigan's longstanding administrative

system for compensating workers for workplace injuries was carefully structured to provide the "quid" of predictable recovery in return for the "quo" of limited remedies. That regime is exclusive – no private right of action for damages is allowed. A worker's recourse for "wrongful" or bad faith denial of benefits – which necessarily includes fraud – is to pursue a claim through the system. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 861. Indeed, that is apparently what several of the plaintiffs here have done, ultimately pursuing and obtaining their claimed benefits. *See* Pet. 28, n. 9.

Accordingly, in the parlance of the McCarran-Ferguson Act, permitting a RICO remedy for Michigan workers' compensation claimants would "impair" the business of insurance by imposing a broad set of remedies that are inconsistent with the carefully-considered existing regime. The Sixth Circuit, however, ignored the careful consideration of state remedies and intent mandated by this Court's decision in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and held to the contrary. *Humana* established that the meaning of "impair" under McCarran-Ferguson is "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Id.* at 309-10 (quoting Black's Law Dictionary 752 (6th ed. 1990). In so defining "impair," this Court expressly rejected the view "that Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 309.

The Nevada insurance regime in *Humana* specifically permitted both statutory and common-law damages for insurance fraud, and encompassed punitive damages – up to treble the actual damages – within the state regulatory regime. In such circumstances, this Court carefully considered the specific parameters of the state system to hold that RICO remedies would complement, rather than impair, the state's regime. *Id.* at 313-14.

Here, the state system is different in dispositive ways. None of the Nevada-specific factors that supported permitting RICO claims in *Humana* is present in the Michigan system:

(1) The Michigan workers' compensation regime does not permit a private right of action either in federal or state court, for wrongful or bad faith denial of workers' compensation benefits. Pet. App. 30a. *See also Lisecki.*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 864; *Wright*, 220 F. Supp. 2d at 845 n.9 (granting summary judgment dismissing claim for tortious denial of workers' compensation benefits because [n]o such cause of action exists"). *Humana* specifically cited the availability of private rights of action under Nevada law as a factor weighing in favor of extending the RICO remedy. *See* 525 U.S. at 312.

(2) Likewise, there is no a common law right of action in Michigan for wrongful or bad faith denial of benefits, necessarily including fraud, connected to the denial of workers' compensation benefits. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174.76; *Hajciar*, 369 N.W.2d at 864. This, too, is

an important factor under *Humana*. 525 U.S. at 312 (citing availability of common law right of action under Nevada law).

(3) No Michigan law provides a similar ground for suit. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 864. *Compare Humana*, 525 U.S. at 312 (citing Nevada Unfair Insurance Practices Act expressly prohibiting the type of insurance fraud that the *Humana* plaintiffs challenged).

(4) Michigan employees cannot receive any tort damages for denied workers' compensation benefits, let alone punitive damages. Thus, a private action under RICO, with its treble damages, would permit plaintiffs to seek greater recourse than that available under the WDCA. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 864. *Compare Humana*, 525 U.S. at 313 (citing availability of punitive damages for insurance fraud under Nevada law).

(5) Michigan employees seeking workers' compensation benefits through the administrative appeals process cannot obtain the treble damages and attorneys' fees permitted by RICO, as the district court below explained. Pet. App. 63a. Rather the legislature has provided them with a certain and predictable but smaller recovery for workplace injuries. Employees who are injured but not completely unable to work are entitled to weekly benefits of 80% of the difference between the pre- and post-injury pre-tax wages. Mich. Comp. Laws §418.305(b). Employees who are totally

incapacitated are entitled to 80% of the employee's after-tax average weekly wage. *Id.* at §418.351(1). If an employer fails to begin paying benefits within 30 days of the due date (where benefits are not in dispute), the employer must pay the employee a $50 per day penalty for each day the benefits are late, which is capped at $1500. *Id.* at §418.801(2). *Compare Humana*, 525 U.S. at 313 (citing fact that damages for insurance fraud already available under Nevada law include damages equal to, or potentially even greater than, RICO's treble damages).

(6) Michigan has articulated a strong policy supporting its exclusive administrative regime, through statements in several state supreme court cases regarding exclusivity and its importance to the goals of workers compensation, and by expressly precluding private judicial rights of action. *See Simkins v. General Motors Corp.*, 556 N.W.2d 839, 844 (Mich. 1996) (WDCA's purpose "is to provide...not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate") (citation and internal quotation marks omitted); *Downie*, 362 N.W.2d at 617 (rejecting the notion that "principle[s] of fairness, alone, should operate to allow abrogation of the employer immunity provided by the WDCA" because this would ignore "that the employer has already made concessions and assumed liabilities to the employee, for which his immunity was the quid pro quo") (citation and internal quotation marks omitted); *accord Husted*, 135 N.W.2d at 375. *Compare*

Humana, 525 U.S. at 313-14 (citing fact that Nevada had taken no position on the question presented).

Nor is it correct, as the Sixth Circuit found, that the fact that Michigan workers' compensation law sanctions employers for wrongfully denying benefits means that a RICO remedy is consistent with state policy or the administrative system. Pet. App. 25a (citing Mich. Comp. Laws §§418.631, 418.801). The availability of some in-system remedy for wrongful denial does not justify exposing employers to expansive liability outside the closed system contrary to the legislature's intent. And it would be particularly deleterious to extend such liability through a private right of action (currently unavailable to employees) that would vastly exceed employers' liability under the current administrative regime.

Accordingly, this Court should grant certiorari to ensure that *Humana* is correctly applied. The consequences of the Sixth Circuit's erroneous decision, if uncorrected by this Court, will be far-reaching. As discussed *infra* at 21-22, RICO remedies would be injected immediately into workers' compensation regimes in Michigan, Ohio, Kentucky, and Tennessee[3] contrary to state

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[3] *See, e.g., Sanek v. Duracote Corp.*, 539 N.E.2d 1114, 1116-17 (Ohio 1989) (tort suits generally not allowed for workplace injuries, with a very limited exception where the employer commits an intentional tort that results in an employee's injury); *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340, 342 (Ky. 1986) (exclusive liability provisions of the Kentucky workers' compensation law cannot be waived except where the employer fails to secure insurance or commits willful and unprovoked

legislative intent. The same result could potentially occur nationwide.

C. The Sixth Circuit's Reasoning is Inconsistent with Cases from Other Circuits Declining to Expand RICO into Comprehensive and Exclusive Remedy Regimes

Other circuits have recognized that RICO was never intended to create a private right of action for damages that would substantively expand the remedies available in exclusive administrative regimes. In *Danielsen v. Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1227 (D.C. Cir. 1991), for instance, the D.C. Circuit held that employees of service corporations contracting with the United States could not sue their employers under RICO, because the Service Contract Act ("SCA") provided an exclusive administrative remedy. The D.C. Circuit reasoned that "the [SCA] envisions a comprehensive administrative rubric for the protection of federal service workers." *Id.* at 1227 (quoting *Miscellaneous Service Workers, etc. v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981)) (internal quotation marks omitted). Where Congress has established such a regulatory scheme, "the specification thereof normally excludes duplicative judicial jurisdiction." *Id.* (citations and internal quotation marks omitted). Courts should be

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physical aggression); *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239 (Tenn. 2003) (workers' compensation is the exclusive remedy except where the employer's intentional tort caused the injury).

especially vigilant to avoid such duplication "in a scheme such as the SCA where Congress provided the statutory right for a limited and governmental cause of action for underpayment." *Id.* Accordingly, the court refused to "undercut the specific remedy prescribed by Congress." *Id.* at 1228.

In similarly holding that RICO should not be expanded into an area where Congress created an exclusive administrative remedy, the Eleventh Circuit explained that "there is a presumption" Congress "provided precisely the remedies it considered appropriate." *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1222-23 (11th Cir. 2002) (finding that the Higher Education Act of 1965 does not confer a private right of action; therefore plaintiffs may not sue under RICO for HEA violations). That court rejected the plaintiff's argument that a private remedy was warranted because the administrative regime was inadequate, reasoning that "it is not up to this Court to create a statutory remedy based on the notion that Congress could have done a better job of legislating the statutory scheme. As the Supreme Court has made clear, 'the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.'" *Id.* at 1223 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)). *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement") (internal citations omitted).

The reasoning in these cases is incompatible with the Sixth Circuit's. In *Danielsen* and similar cases, courts declined to inject RICO into administrative systems designed to provide a certain and exclusive set of remedies to claimants. In this case, in contrast, the Sixth Circuit found RICO remedies appropriate in just such an exclusive administrative regime. That this case arises in the context of federal incursion upon a state's exclusive administrative regime makes the issue all the more compelling for certiorari. This Court should grant review to ensure consistency among the lower courts on these vital issues and to prevent the application of the Sixth Circuit's erroneous reasoning to other states and to other administrative regimes.

II. This Court Should Grant Certiorari to Address The Sixth Circuit's Holding That Workers' Compensation Is Not Insurance

Another incorrect aspect of the Sixth Circuit's decision that warrants review is the determination that RICO may be extended into Michigan workers' compensation regime because: (1) worker's compensation regimes were not enacted to regulate the business of insurance within the meaning of McCarran-Ferguson and (2) even if they were, "self-insurance" does not count as insurance. These conclusions are contrary to precedents of this Court and others, and have far-reaching ramifications that support a grant of certiorari.

Workers' compensation "is an important part of American social insurance." NASI Report at 1. *Accord Lauder v. Paul M. Weiner Foundry*, 72

N.W.2d 159, 172 (Mich. 1955) (workers compensation is "insurance of a social character") (internal citation omitted). At bottom, the system spreads and transfers risk from the worker – who previously had to cover all expenses for work-related injuries unless she succeeded in expensive and hard-to-win tort litigation – to the employer – which now must cover such expenses regardless of fault.[4] That is the essence of insurance.[5]

Moreover, the system expressly requires risk reallocation via insurance – the employer must either obtain workers' compensation insurance or it may self-insure after proving to state regulators that it is financially able to do so. NASI Report at 6, 14. The Sixth Circuit recognized that "there are several provisions of the WDCA that directly relate to the terms of the insurance contract and thus to the

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[4] Whether a practice is the "business of insurance" depends on three factors, none by itself determinative. First, whether the practice "has the effect of transferring or spreading a policyholder's risk." Second, whether the practice is an integral part of the relationship between insurer and insured. Third, whether the practice is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

[5] The Sixth Circuit also suggested that because the workers' compensation system was a replacement for tort liability, the statute could not have been "enacted" to regulate the business of insurance. Pet. App. 16a, 24a. That is incorrect. It is neither impossible nor inconsistent for a statute like the WDCA to have multiple purposes, including both replacing a tort system that was not working for either employer or employee and spreading and transferring risk in a manner that constitutes the business of insurance.

'business of insurance,'" but held that the "crucial" point in this case was that the employer self-insured. Pet. App. at 23a. Self-insurance, the Sixth Circuit concluded, "does not relate to the 'business of insurance' under the McCarran-Ferguson Act...." *Id.*

The Sixth Circuit disregarded the reality of Michigan's treatment of its self-insured employers to impose a broad and unrealistic rule that self-insurance is never insurance. Under the regime at issue here, "self-insured" does not equal "uninsured," as the Sixth Circuit seemed to assume. Welch & Royal at §2.17. Rather "self-insurance is not automatically available to anyone who does not have insurance." *Id.* Employers wishing to self-insure must be approved by the Worker's Compensation Agency. *Id.* There is a detailed and precise set of requirements for employers who choose to self insure, including requirements for demonstrating solvency and liquidity. Mich. Comp. Laws §418.611. The workers' compensation bureau may deny or revoke permission to self-insure based on factors including: operating results, financial trends, economic conditions, management quality, liabilities, litigation, and payroll size. Mich. Admin. Code R. 408.43c (2009). Self-insured employers must adhere to certain requirements, including providing a letter of credit or surety bond upon request by the bureau and retaining a claims service company. *Id.* at 408.43a.

The Sixth Circuit's faulty assumption that "self-insured" means "uninsured" leads to unfair and inconsistent results. There is no rational reason why workers who happen to work for an employer that

chooses the "self-insurance" option should have a RICO remedy while those employed by companies that purchase insurance will not. But that is a necessary consequence of the Sixth Circuit's opinion.

Moreover, employers who self-insure are typically not personally liable for all claims, but rather have some kind of outside or excess insurance for clams. Michigan has about 30 "group self-insurance funds, or pools," in which employers who meet state requirements to self-insure spread risk among themselves. Welch & Royal at §2.13. Also, most self-insured employers purchase "specific excess insurance" from an insurance company that agrees to cover the employer in the event a large disaster kills or injures a large number of people at once. *Id.* at §2.17.

Even employers who buy insurance for workers' compensation claims generally are personally liable for some portion of the claim, up to the deductible on their policies. "Employers who have policies with deductibles are, in effect, self-insuring up to the amount of the deductible. That is, they are bearing that portion of the financial risk." NASI Report at 15-16, *quoted in* Cert. Pet. at 23, n. 7. Employer-paid benefits under these policies with deductibles totaled $8.205 million in 2006. *Id.* at 15. If the Sixth Circuit is correct that self-insurance is not "insurance," does that mean that employees may bring RICO actions if their claims were paid before the employer met its deductible for the year, but that they lose the RICO right if their claims were paid by the insurance carrier? And how would any employee know whether it had a RICO claim under this rule?

Finally, the Sixth Circuit's erroneous rule that self-insurance is not insurance would have broadly harmful effects, both in the workers' compensation area and beyond. Self-insurance is hardly a rare practice. All but two of the states expressly permit self-insurance for workers' compensation claims. NASI Report at 14. In 2006, self-insured employers paid 24% of workers' compensation benefits (or $13.114 billion) in the United States. *Id.* Many large corporations choose to self-insure. *Id.* In Michigan, 650 of the state's 200,000 employers choose to self-insure, yet these are such large companies that they account for about 45% of all benefits. Welch & Royal at §2.17. In the wake of the Sixth Circuit decision in this case, what rational employer will choose to self-insure and render itself ineligible for the limited liability provisions that workers' compensation was designed to provide?

The decision below could also adversely affect other self-insurance schemes outside the workers' compensation context. For example, "[a]ccording to a 2000 report by the Employee Benefit Research Institute (EBRI), approximately 50 million workers and their dependents receive benefits through self-insured group health plans sponsored by their employers. This represents 33% of the 150 million total participants in private employment-based plans nationwide." *See* Self Insurance Institute of America, "Self Insured Group Health Plans," http://www.siia.org/i4a/pages/Index.cfm?pageID=4546. If self-insurance is no longer insurance, the Sixth Circuit's decision could alter the rights and

responsibilities of those who participate in other self-insurance programs.

III. The Substantial Practical Effects Created By Grafting RICO Onto State Workers' Compensation Systems Also Support Review

In practice, expanding RICO into the exclusive remedial systems that states have set up to provide compensation for workplace injuries will create a variety of adverse effects that further justify this Court's review of the Sixth Circuit's decision. RICO's treble damages and attorneys fees, as well as the possibility of class certification and far more extensive discovery, will operate as a strong incentive for claimants and their lawyers to challenge denials of workers' compensation benefits under RICO rather through the existing – and no longer exclusive – state administrative regime. As the D.C. Circuit explained in *Danielsen,* 941 F.2d at 1227-28, when plaintiffs have the option through RICO of seeking three times the remedy otherwise available to them, and when their "attorneys would be extracting their fees not from their clients but from the other side," those plaintiffs are likely to choose RICO claims rather than the comprehensive administrative system.

Such a result would plainly "undercut the specific remedy prescribed" (*id.*) in state workers' compensation regimes, thereby "frustrat[ing] declared state policy" and "interfere[ing] with a State's administrative regime." *Humana,* 525 U.S. at 310. *See supra* at 9-13.

In practical terms, there would be a variety of effects. Determination of the merits of workers' compensation claims would be removed from the state workers' compensation magistrates who have specialized expertise and experience in the area, and whom the state legislature has designated as the appropriate officers to adjudicate these claims. The issue of whether workers' compensation benefits were due in the first instance is a necessary prerequisite to a finding of fraudulent denial of those benefits. If RICO claims are permitted, workers' claims of entitlement to benefits under state workers' compensation law will either be litigated for the first time in federal or state court or re-litigated there even though a state workers' compensation magistrate has already determined them.

Those who practice in this area recognize that such intrusions will undermine the existing system. As a direct result of the decision below, "[a] federal trial judge now must determine whether certain medical evidence and opinions have relevance in denying workers comp benefits." *See* Roberto Ceniceros, "Court Allows RICO Suit Over Comp Claim Denial." Business Insurance, Nov. 3, 2008, *available at* http://www.businessinsurance.com/article/20081102/ISSUE01/100026368. As explained *supra* at 6-7, "such determinations have statutorily been the domain of Michigan workers compensation magistrates, who have experience with such matters." *Id.*

Permitting a federal or state court in the context of a RICO action to determine the merits of workers'

claims raises numerous practical issues, in addition to removing those claims from those with specialized knowledge and experience in the area. Complicated questions of finality and claim and issue preclusion could arise if a worker brought a RICO claim after receiving a determination she did not agree with in the state system. There would be questions of exhaustion of administrative remedies, and application of federal abstention doctrines, arising if a worker sought relief through RICO before adjudicating the claim through the state's system.

Engrafting RICO remedies onto state workers' compensation systems also could lead to substantially increased costs – both litigation costs and increased liability – further doing violence to the state policies of predictable but limited recovery expressed in the existing exclusive remedial systems. These limited-liability systems are especially important since the scope of workers' compensation in this country is enormous. Workers' compensation covered 130.3 million workers (who collectively earned $5.5 trillion in wages) in 2006. NASI Report at 2, 8. Employers across the United States spent $88.9 billion in 2005 and $87.6 billion in 2006 on workers' compensation insurance. *Id.* at 2. For every $100 of covered wages in the United States, $.99 in benefits were paid, and employer costs were $1.58. *Id.* at 2.

An increase in employers' costs could have adverse effects on the continued viability of large and small businesses – a real concern in these times of economic hardship – as well as potentially lowering employee wages. NASI Report at 6 (citing economist

conclusions that the costs imposed on business by even the existing workers' compensation system results in lower wages) (citing Leigh, *et al.*, 2000). Finally, because employers inevitably pass workers' compensation costs on to consumers, *Simkins*, 556 N.W.2d at 843-44, the Sixth Circuit's decision could also cause consumer costs to rise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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